UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation This document relates to: All Plaintiffs' Economic Loss Cases.	Case No. 8:10ML 02151 JVS (FMOx) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

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Presently before the Court is Defendants' Motion to Dismiss the claims asserted by the New York and Florida Class Representatives.[1] (Docket No. 2008.)

In addition to the Second Amended Economic Loss Master Consolidated Complaint (hereinafter referred to as the "SAMCC") (Docket No. 580), relevant factual allegations are found in a pleading referred to by the parties (and now the Court) as the Danziger Complaint (see Carol Danziger, et al. v. Toyota Motor Corporation, et al., 2:11-CV-07778 JVS (FMO), Docket No. 10) and the Gudmundson Complaint (Thomas E. Gudmundson v. Toyota Motor Sales, U.S.A., Inc., 2:10-CV-02021 JVS (FMO), Docket No. 1).

A listing of the Plaintiffs relevant to the present Motion is found in the Economic Loss Plaintiffs' Bellwether Class and Class Representative Identification Statement ("Class ID Statement"). (Docket No. 1797.) Subsequent to the filing of the Class ID Statement, the Court dismissed the claims of two Plaintiffs, Ada Morales and Carol Danziger, without prejudice. (Docket Nos. 2206 & 2326.)

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[1] The Motion also challenges certain claims asserted under California law. As noted in the Court's December 1, 2011 Order, those claims have twice been considered by the Court previously. (See Docket No. 2016.) Thus, the Court does not herein consider the challenges to claims asserted under California law.

The designation of "Class Representatives" is used for the sake of clarity; no class has yet been certified, and resolution of any class certification is not expected in the near future. (See Order No. 17 at 4 (setting January 16, 2013 as the date for a class certification hearing).) Where appropriate, the Court also herein refers to these Plaintiffs as "the Florida Plaintiffs" and "the New York Plaintiffs," or other designations. The Court also refers to the Class Representatives as "Plaintiffs," although as appropriate in context this term should be understood to be limited to the Plaintiffs whose claims are challenged by the present Motion.

Thus, these claims are not considered herein.

As set forth herein, the Court grants in part and denies in part Defendants' Motion to Dismiss.

This action arises out of Plaintiffs' purchase of vehicles designed, manufactured, distributed, marketed, and sold by Defendants Toyota Motor Corporation dba Toyota Motor North America, Inc. ("TMC"), and its subsidiary, Toyota Motor Sales, U.S.A., Inc. ("TMS") (collectively, "Toyota" or "the Toyota Defendants").[2] Relevant to the present Motion to Dismiss, putative classes of Plaintiffs seek damages for diminution in the market value of their vehicles in light of defects in those vehicles which lead to incidents of sudden, unintended acceleration ("SUA").[3]

I. Factual Allegations and Claims Asserted

The factual allegations underlying Plaintiffs' claims are set forth at length in the Court's November 30, 2010 and May 13, 2011 Orders. (Docket Nos. 510 &

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[2] TMC is a Japanese corporation and is the parent corporation of TMS, which handles sales and marketing in the United States. (SAMCC ¶¶ 133-34). The SAMCC makes allegations as to the Toyota Defendants collectively, and at times individually. The Court makes such distinctions only when material to the issues presented in the present Motion to Dismiss.

[3] In addition to the putative class of individuals, a small number of business entities — such as an auto dealership and a car rental business — are Plaintiffs as well. (SAMCC ¶¶ 71-86.) The Court refers to these business entities as the "non-consumer Plaintiffs."

1414.) The Court reiterates those allegations in this Order only to the extent necessary to give context to the Court's legal analyses.

Plaintiffs assert the following claims based on Florida law and federal law: (1) Violation of Florida's Unfair & Deceptive Trade Practices Act (§§ 501.201-501.213); (2) Breach of Express Warranty (Fla. Stat. § 672.313); (3) Breach of the Implied Warranty of Merchantability (Fla. Stat. § 672.314); (4) Revocation of Acceptance (Fla. Stat. § 672.608); (5) Breach of Contract/Common Law Warranty; (6) Fraud by Concealment; (7) Unjust Enrichment; and (8) Violation of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301, et seq. ("MMA"). (See SAMCC at 325-36; Danziger Compl.[4] at 199-207.)

Plaintiffs also assert the following claims based on New York law: (1) Deceptive Acts or Practices (N.Y. Gen. Bus. Law § 349); (2) False Advertising (N.Y. Gen. Bus. Law § 350); (3) Breach of Express Warranty (N.Y. U.C.C. § 2-313); (4) Breach of Implied Warranty of Merchantability (N.Y. U.C.C. § 2-314); (5) Revocation of Acceptance (N.Y. U.C.C. § 2-608); (6) Breach of Contract/Common Law Warranty; (7) Unjust Enrichment; and (8) Violation of the

[4] The cause of action for violation of the MMA on behalf of the Florida Plaintiffs is not asserted in the SAMCC, but it is asserted in the Danziger Complaint. Because the present Motion to Dismiss is the first to address the pleading sufficiency of the claims asserted under Florida and New York law, the Court considers all the claims as if they have been asserted on behalf of all identified class Plaintiffs, regardless of whether those claims are set forth in the SAMCC, the Danziger Complaint, or both. (The Gudmundson Complaint asserts a subset of the claims set forth above.)

MMA, 15 U.S.C. §§ 2301, et seq. (See SAMCC at 554-64; Danzinger Compl.[5] at 207-16.)

Subsequent to the filing of the operative Complaints, as noted in the Court's Order Denying the Motion to Compel Arbitration, Plaintiffs have opted not to pursue their claims of revocation and unjust enrichment. (Docket No. 2312 at 45.) These claims are therefore dismissed without prejudice.

II. Standard for Dismissal and Controlling Law

A. Standard for Dismissal Pursuant to Rule 12(b)(6) and 12(c)

Toyota moves to dismiss all claims for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In certain instances, where an answer has been filed, Toyota also moves for judgment on the pleadings pursuant to Rule 12(c). The legal standard governing dismissal is the same in either instance.

Judgment on the pleadings is appropriate when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 12(c); Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). Thus, a motion for judgment on the pleadings is governed by the same standard as

[5] The cause of action for violation of the MMA on behalf of the New York Plaintiffs is not asserted in the SAMCC, but it is asserted in the Danziger Complaint.

a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980).

Pursuant to Rule 12(b)(6), a plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff's factual allegations support reasonable inferences that could support a finding of liability. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Most succinctly stated, a pleading must set forth allegations that have "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1940. Courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'" Id. at 1950 (quoting Twombly, 550 U.S. at 555). "In keeping with these principles[,] a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950.

Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 1950. This determination is context-specific, requiring the Court to draw on its

experience and common sense; there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

Claims sounding in fraud must clear an additional hurdle. To survive a motion to dismiss under Rule 12(b)(6), allegations of fraud must meet the heightened pleading requirements of Rule 9(b). Specifically, allegations of fraud "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

A plaintiff must allege particular facts explaining the circumstances of the fraud, "including time, place, persons, statements made[,] and an explanation of how or why such statements are false or misleading." Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1265 (C.D. Cal. 2007). The circumstances of the alleged fraud must be specific enough "to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Vess v. Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks and citation omitted); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

Under Rule 9(b), a plaintiff must plead each of the elements of a fraud claim with particularity, i.e., a plaintiff "must set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original). Fraud claims must be accompanied by the "who, what, when, where, and how" of the fraudulent conduct charged. Vess, 317 F.3d at

1106.

B. Controlling Law

In analyzing state-law claims, the Court must apply controlling decisions of the relevant state's highest court; however, where such precedent is lacking, the Court must consider rulings of other courts of that state and must attempt to ascertain how the state's highest court would decide the issue. See Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967) ("If there is no decision by [the state's highest] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); Guebara v. Allstate Ins. Co., 237 F.3d 987, 993 (9th Cir. 2001) ("Our task is to surmise how the [state's highest] court would decide the issue."); Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 663 n.10 (9th Cir. 1998) ("In the absence of controlling . . . precedent [from the state's highest court], we are Erie-bound to apply the law as we believe that court would do so under the circumstances.").

With these standards in mind, the Court considers the claims Plaintiffs assert based on Florida and New York law. Before doing so, however, the Court considers a threshold legal issue regarding the requirement that the alleged defect be manifested before those claims may be asserted.

III. Manifestation of Defect

Toyota argues broadly that Plaintiffs cannot maintain any claim under Florida or New York law in the absence of a manifested defect.[6] In both cases, the Court agrees,[7] although in New York there must be both an absence of a manifested defect and a financial loss actually recognized on sale. (See Motion at 3-8, 23-24.)

A. Florida

After the dismissal of Carol Danziger (Docket No. 2326), the remaining Florida Class Representatives are Vuin Edward Epps, Ziva Goldstein, Tom Gudmundson, Linda Savoy, and Elizabeth Van Zyl (SAMCC ¶ 66; see Class ID Statement at 14).[8] Of these Plaintiffs, only the claims of Van Zyl involve a vehicle

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[6] This issue presents a separate question from the Article III standing issues previously addressed by this Court, which are now before the Ninth Circuit on interlocutory appeal. (Ninth Circuit Order, Docket No. 1988.)

[7] At the hearing, Plaintiffs argued for the first time that the Court should excuse this requirement to the extent the Florida and New York Plaintiffs seek certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, which authorizes injunctive and declaratory relief on behalf of a class. (04/23/2012 Tr. at 17.) Although such relief is sought in the SAMCC, this argument was not raised in the Opposition, and therefore the Court declines to consider it.

[8] Toyota identifies a larger group of Plaintiffs. (Compare Class ID Statement at 14 (identifying 6 Florida Class Representatives) with Dawson Decl. Ex. A-2 (identifying over 70 more such Plaintiffs)). In part, this is so because the Plaintiffs chose not to name all the Florida Plaintiffs in their Class ID Statement;

that has manifested a SUA defect (SAMCC ¶ 66).

The Florida Supreme Court has not decided the manifestation of defect issue. Accordingly, and as noted previously, this Court's task "is to predict how the [Florida Supreme Court] would resolve it." See Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482 (9th Cir. 1986). In making this prediction, the Court looks to "decisions by intermediate appellate courts of the state and by courts in other jurisdictions." Id.

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thus, there are allegations in the Danziger Complaint regarding Florida Plaintiffs who are not Class Representatives.

Toyota also identifies a larger group of Plaintiffs because it includes Plaintiffs named in certain underlying actions. (See Dawson Decl. Ex. A-2.) Many of these actions have been dismissed without prejudice in favor of proceeding on the claims asserted in the SAMCC. (See Order No. 10 (Docket No. 498) at 4 (dismissing without prejudice all economic loss actions in this MDL in favor of the then-operative consolidated Complaint).) The remainder of these actions, those filed after the date of Order No. 10 (November 17, 2010), are hereby expressly made subject to Order No. 10 and are dismissed without prejudice. (See, e.g., Timothy Helmick, et al. v. Toyota Motor Sales, USA, Inc., et al., No. 8:11-CV-01136 JVS (FMO) (C.D. Cal.) (filed in transferor court July 11, 2011).) To the extent any of the operative pleadings in these cases set forth allegations relevant to any of the Class Representatives, those must be set forth in the Third Amended Master Consolidated Complaint ("TAMCC") authorized by this Order. For example, the allegations of the newly added Danziger Plaintiffs who are also Class Representatives must be set forth in the TAMCC.

This is not to say, however, that the Court's rulings do not have general applicability to other Plaintiffs. (Cf. Order Denying Motion to Compel Arbitration at 55 n.23.) Rather, it merely limits the Court's express ruling to the matters currently before the Court.

1. *Collins* and *Kia Motors*

Plaintiffs argue that Florida law allows owners of dangerously defective vehicles to recover economic losses before a malfunction occurs. (Opp'n at 1, 5.) They rely primarily on the decision of the Florida District Court of Appeal in Collins v. DaimlerChrysler Corp., 894 So. 2d 988 (Fla. Dist. Ct. App. 2004). In the end, Plaintiffs' argument fails because (1) Plaintiffs interpret Collins too broadly and, in any event, (2) Florida courts have followed a different path as to the manifestation of defect issue since Collins.

The issue in Collins was whether the plaintiff sufficiently stated a claim under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201-501.213. The plaintiff alleged that the "GEN-3 seatbelt buckles" in her Chrysler vehicle were "unreasonably dangerous and unfit for ordinary use as a passenger restraint system." Collins, 894 So. 2d at 989. She sought to represent a putative class consisting of persons who purchased or leased Chrysler vehicles equipped with the GEN-3 seatbelt buckles, and to recover the diminished value of her vehicle caused by the alleged safety defect. Id. at 989-90 & n.2. Chrysler argued that the plaintiff had to allege "that the seatbelt ha[d] malfunctioned or manifested the alleged defect in some way to state a cause of action under FDUTPA." Id. at 990. The court disagreed. Id.

The Collins court explained that "Florida courts have allowed diminished value to serve as 'actual damages' recoverable in a FDUTPA claim since at least . . . 1984." Id. Furthermore, the court found "no requirement in FDUTPA

that a defect manifest itself by failing to operate in an emergency or by causing injury." Id. In a footnote, the court suggested that the case was "unique" in that it involved "special reliability concerns." Id. at 991 n.3. It noted that seatbelts "are used for emergency protection of human life," and that owners of vehicles with defective seatbelt buckles would have no way of knowing whether they would function correctly "until an unexpected moment of impact." Id. Relying on DaimlerChrysler Corp. v. Inman, 121 S.W.3d 862 (Tex. App. 2003), a factually similar case decided by the Texas Court of Appeals, the Collins court explained that the use of a defective seatbelt "may . . . imbue [the] dangerously defective product with a false and misleading appearance of reliability." Collins, 894 So. 2d at 991 n.3 (quoting Inman, 121 S.W. 3d at 879).[9] The plaintiff's allegation "that she did not get what she bargained for" — a safe, defect-free vehicle — was sufficient to state a FDUTPA claim, regardless of the claim's ultimate merit. Id. at 991. Notably, the Collins court recognized that other jurisdictions with consumer protection laws similar to FDUTPA supported Chrysler's argument. Id. at 990. However, it stated that "Florida decisional law has followed a different track." Id.

Toyota argues that Collins is distinguishable from this case on its facts "because it involved allegations of seatbelt buckles that were currently defective, rather than having a 'propensity' to malfunction." (Motion at 8 (emphasis in original).) In support of this argument, Toyota cites Everett v. TK-Taito, L.L.C., 178 S.W.3d 844 (Tex. App. 2005), in which the Texas Court of Appeals held that

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[9] Collins' reliance on Inman proved ill-founded, because the Texas Supreme Court reversed, finding no standing. DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 307-08 (Tex. 2008). See footnote 14, infra.

the plaintiffs did not have standing to assert their consumer protection statute claims because, unlike the plaintiff in Collins who alleged that the seatbelt buckles in her vehicle were defective, the plaintiffs in Everett merely alleged that the seatbelt buckles in their vehicles had a propensity to only partially engage. Id. at 859. Toyota also cites Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233 (Wis. 2004), in which the Wisconsin Supreme Court distinguished claims that engines "have failed, will fail, or are reasonably certain to fail" from claims for diminution in value based on a mere propensity for the alleged defect to manifest. Id. at 240.

The Court is not convinced that Collins is distinguishable from this case on its facts. Like Collins, in which the plaintiff asserted a FDUTPA claim based on allegedly defective seatbelt buckles that had not malfunctioned, here, several Florida Plaintiffs assert FDUTPA claims based on allegedly defective vehicles that have never manifested the SUA defect.[10] The plaintiff in Collins did not suggest that all GEN-3 seatbelt buckles would malfunction in a time of need; rather, she merely alleged that they were "unreasonably dangerous and unfit for ordinary use as a passenger restraint system." Collins, 894 So. 2d at 989. Part of the Collins court's reasoning in not requiring manifestation of the defect was that owners of vehicles with those seatbelt buckles would not know whether they would function correctly "until an unexpected moment of impact." Id. at 991 n.3. The economic losses were apparently due to this uncertainty. Accordingly, under the Collins

[10] The Plaintiffs in this case allege a "dual defect": "their vehicles were defective from the moment of purchase because the vehicles at that time had a propensity for SUA and the vehicles did not contain adequate fail-safe and brake-override mechanisms to prevent or stop a SUA event." (Opp'n at 7 (emphasis in original).)

analysis, it seems that any plaintiff who "did not get what she bargained for" may seek recovery under FDUTPA, even if the diminished value of the vehicle is due to a propensity to manifest some defect. See Collins, 894 So. 2d at 990-91. Even so, the Court is not convinced that Collins controls the outcome of the manifestation of defect issue for other reasons.

Plaintiffs interpret Collins too broadly. Contrary to Plaintiffs' position, Collins does not stand for the proposition that Florida law allows owners of dangerously defective vehicles to recover economic losses before a malfunction occurs. Instead, it supports the much narrower proposition that for purposes of stating a FDUTPA claim, Florida law does not require "that a defect manifest itself by failing to operate in an emergency or by causing injury." See Collins, 894 So. 2d at 990. As Toyota correctly notes (Motion at 8 n.7), the trial court in Collins dismissed the plaintiff's express and implied warranty claims for failure to allege manifestation of the seatbelt buckle defect, Collins v. DaimlerChrysler Corp., No. 2002-CA-6634, 2003 WL 25899984, *1-2 (Fla. Cir. Ct. 2003) (reasoning that "Plaintiff is attempting to recover for a product that has performed satisfactorily"). On appeal, she reasserted only her FDUTPA claim. Collins, 894 So. 2d at 989. The analysis of the Florida District Court of Appeal relied heavily on the meaning of "actual damages" within FDUTPA. See id. at 990-91 ("We see no requirement in FDUTPA that a defect manifest itself . . . ." (emphasis added)). In no way did the court indicate that its holding applied beyond the context of FDUTPA.

Even if the Court were to accept Plaintiffs' broad interpretation of Collins, it would not dictate the outcome here because Florida courts have followed a

different path as to the manifestation of defect issue since Collins. The Court agrees with Toyota that Kia Motors America Corp. v. Butler, 985 So. 2d 1133 (Fla. Dist. Ct. App. 2008), a case decided by the Florida District Court of Appeal four years after Collins, reflects current Florida law on the manifestation of defect issue with respect to all claims based on an allegedly defective product. (See Motion at 6.)

Kia Motors involved a class action complaint against Kia alleging that certain of its vehicles contained a brake system design defect that caused "premature wear" of the front brakes, which could cause those vehicles "to be unable to stop, suffer an impaired stopping performance, exhibit increased stopping distances, brake shudder, brake vibration, unpredictable and violent brake pedal pressures, brake lock up, and loss of control when activated." Id. at 1134. Like the plaintiff in Collins, the plaintiffs in Kia Motors sought to recover economic losses based on their vehicles' diminished value. Id. And like the Florida Plaintiffs here (SAMCC ¶¶ 502-16, 888-916; Danziger Compl. ¶¶ 403-17, 433-61), the plaintiffs in Kia Motors asserted claims for violations of the Magnuson Moss Warranty Improvement Act, 15 U.S.C. §§ 2301-2312, and FDUTPA, as well as claims for breach of implied warranty and breach of express warranty, Kia Motors, 985 So. 2d at 1135.

The main issue in Kia Motors was whether the trial court properly certified the purported class of Kia vehicle owners. The court found that "individual issues predominate[d] over common ones, and the class mechanism [was] not superior to other available avenues of relief." Id. at 1137-42. Therefore, it held that the trial

court abused its discretion in certifying the class. Id. at 1143. But the court also provided "two additional, readily apparent reasons" why the case could not proceed as a class action. Id. at 1138-39. The first reason, which is relevant here, was that the class representative sought "compensation not only for class members whose brakes [had] manifested a deficiency, but also for those whose brakes [had] performed satisfactorily." Id. at 1139.

After examining the law of several other states that have addressed the manifestation of defect issue, the Kia Motors court concluded that the "majority of jurisdictions" consistently deny class recovery when not all members of the class allege manifestation of some defect. Id. (citing cases applying Alabama, California, District of Columbia, Illinois, Kentucky, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, South Carolina, and Texas law). The cases cited by the court involved not only class certification, but also motions to dismiss. See, e.g., Briehl v. Gen. Motors Corp., 172 F.3d 623 (8th Cir. 1999) (affirming district court's dismissal of plaintiffs' economic loss claims based on alleged vehicle defect because plaintiffs did not allege manifestation of a defect); Carlson v. Gen. Motors Corp., 883 F.2d 287 (4th Cir. 1989) (affirming district court's dismissal of claims for "lost resale value" of plaintiffs whose vehicles never manifested the defect).

In a footnote, the Kia Motors court adopted the rationale of Judge Frank Easterbrook of the Seventh Circuit for "why the majority rule is the correct rule." Kia Motors, 985 So. 2d at 1139 n.5 ("Judge Easterbrook's reasoning [in In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)] is particularly

instructive in this case."). According to Judge Easterbrook, a "mixed system" that compensates buyers of products that never manifest a defect and buyers of products that manifest the defect overcompensates the buyers and leads to excess precautions by the sellers. In re Bridgestone/Firestone, Inc., 288 F.3d at 1017 n.1. He further explained that owners of vehicles with a mere propensity to fail would get everything they bargained for if the alleged defect never manifested, or if it was fixed.[11] Id.

After examining the law of several other states and adopting the economic and policy rationale of Judge Easterbrook, the Kia Motors court pronounced that Florida courts "have firmly aligned [themselves] with [the] majority jurisprudence." Kia Motors, 985 So. 2d at 1139 (citing Ortiz v. Ford Motor Co., 909 So. 2d 479 (Fla. Dist. Ct. App. 2005), a post-Collins case).[12] Unlike Collins, in which the court simply could "see no requirement in FDUTPA that a defect manifest itself," the Kia Motors court relied on an economic- and policy-based rationale for adopting the majority rule on the manifestation of defect issue.[13]

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[11] The Collins court cited In re Bridgestone/Firestone, Inc. in rejecting other jurisdictions' approaches to economic losses. Collins, 894 So. 2d 988.

[12] The Kia Motors court also held that, "as a matter of law," the class members could not recover all the damages they sought under FDUTPA because the statute entitles claimants only to "actual damages." Id. at 1140. "FDUTPA 'actual damages' do not include consequential damages, such as repair damages or resale damages . . . ." Id. Although this holding seems to conflict directly with Collins, the Kia Motors court did not cite Collins, much less distinguish it.

[13] At the hearing, Plaintiffs presented Collins and Kia Motors as conflicting appeals decisions that should be afforded equal weight. (See 04/23/2012 Tr. at 15-16.) However, as explained herein, Plaintiffs read Collins too broadly. The

Compare Kia Motors, 985 So. 2d at 1139, with Collins, 894 So. 2d at 990-91.[14]

Plaintiffs argue that the Court should not be guided by Kia Motors because "unlike the Collins decision, [Kia Motors] did not involve a safety defect that rendered vehicles dangerous and unreliable." (Opp'n at 8.) The Court disagrees. Plaintiffs omit from their brief that the alleged defect in Kia Motors caused the vehicles "to be unable to stop, suffer an impaired stopping performance, exhibit increased stopping distances, brake shudder, brake vibration, unpredictable and violent brake pedal pressures, brake lock up, and loss of control when activated." Kia Motors, 985 So. 2d at 1134 (emphasis added). The "loss of control" risk in Kia Motors is essentially the same risk alleged with respect to the Toyota vehicles at issue here. Plaintiffs also suggest that the defect in Kia Motors was "fundamentally different" from the alleged defect here because the Kia vehicles did

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Collins court considered the manifestation of defect issue in the specific context of FDUTPA, whereas the Kia Motors court considered the issue generally with respect to claims for economic losses based on an allegedly defective product.

[14] Toyota offers another reason why this Court should not follow Collins. (Reply at 7 n.10.) The Collins court relied in part on a factually similar case decided by the Texas Court of Appeals, Inman, 121 S.W.3d 862, which was later overruled by the Texas Supreme Court, 252 S.W.3d 299 (Tex. 2008) (dismissing claims under Texas's equivalent of FDUTPA for lack of standing because plaintiffs had not alleged manifestation of a defect). It is not clear that the Collins court would have reached the same result had it not characterized the case as "unique" based on Inman. In fact, Inman was reversed approximately seven months before the Kia Motors decision. Additionally, Ortiz, the case which the Kia Motors court cited in proclaiming that Florida courts "have firmly aligned [themselves] with th[e] majority jurisprudence," was decided approximately eight months after Collins. Ortiz, 909 So. 2d 476. This suggests that Florida law changed after Collins.

not malfunction "suddenly and unexpectedly." (Opp'n at 9.) But Plaintiffs cite no legal support for this argument other than the portion of Collins in which the court relied on Inman, which the Court declines to follow for reasons already noted. Accordingly, the Court rejects Plaintiffs' argument that Kia Motors should not guide this Court's decision as to the manifestation of defect issue.[15]

2. Post-*Kia Motors* Cases

Toyota contends that "[t]he reasoning and holding in Kia Motors requiring manifestation of a defect is the prevailing law in Florida." (Motion at 7.) The Court agrees. Toyota highlights post-Kia Motors cases that support this position. In Brisson v. Ford Motor Co., 349 F. App'x 433, 434-35 (11th Cir. 2009) (unpublished) (per curiam), the Eleventh Circuit, applying Florida law, held that the "plaintiffs' failure to allege that they experienced a defect . . . [was] fatal" to their warranty claims under the Magnuson Moss Warranty Act. The alleged defect in Brisson was "'extreme' and 'severe' front end oscillation" in Ford trucks.

[15] At the hearing, Plaintiffs argued that their position on the manifestation of defect issue is supported by "Collins plus." The "plus" is a "constellation of facts" that includes statistics showing that Toyota vehicles have a significantly increased risk of SUA, as well as thousands of crashes and hundreds of deaths. (04/23/2012 Tr. at 16.) According to Plaintiffs, they did not bargain for vehicles with such risks. But the economic- and policy-based rationale supporting the rule adopted in Kia Motors applies to all vehicles that have not manifested a defect. As Judge Easterbrook explained, to award buyers "risk of failure" damages would overcompensate them and lead to excess precautions by sellers. Just as in Kia Motors, in which not all Kia vehicles manifested the brake defect, here, not all Toyota vehicles have manifested the SUA defect. Awarding economic losses to all buyers of the Toyota vehicles at issue would lead to the undesirable consequences recognized by Judge Easterbrook.

Brisson, 349 F. App'x at 434. Similarly, in Breakstone v. Caterpillar, Inc., No. 09-23324-CIV, 2010 WL 2164440, at *6 (S.D. Fla. May 26, 2010), the Southern District of Florida, applying Florida law, explained that "it is inappropriate to certify a class containing both individuals who have 'manifested a deficiency' and those whose product has 'performed satisfactorily.'"[16] The plaintiffs in Breakstone alleged that their Caterpillar marine engines had design problems that resulted in severe damage. Id. at *1. The Breakstone court cited Kia Motors for the proposition that "FDUTPA, breach of express warranty, and breach of implied warranty claims all require a showing of actionable defect." Id. at *5. The court also cited with approval a case applying New York law, Weaver v. Chrysler Corp., 172 F.R.D. 96 (S.D.N.Y. 1997), which held that "[p]urchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own." Id. at 99 (alteration in original) (quoting Hubbard v. Gen. Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996)). Most recently, in Cramer v. Ford Motor Co., No. 2007-CA-2135-NC, 2011 WL 2477232, at *1 (Fla. Cir. Ct. June 9, 2011), a Florida Circuit Court cited Breakstone and Kia Motors in recognizing that even FDUTPA claims must be based on an actionable defect.

Plaintiffs also highlight post-Kia Motors cases, but to argue that "Florida

[16] The court presented this as an alternative ground for denying the motion for class certification. The court held that the plaintiff was collaterally estopped from filing a class action claim for damages. Breakstone, 2010 WL 2164440, at *5.

courts follow Collins."[17] (Opp'n at 6.) However, the issue of manifestation is absent in each of these cases. In Smith v. WM. Wrigley Jr. Co., 663 F. Supp. 2d 1336, 1337-38 (S.D. Fla. 2009), the plaintiff sought to recover economic losses under FDUTPA based on a theory that she paid a "price premium" for chewing gum that was falsely advertised as "scientifically proven to help kill germs that cause bad breath." The Southern District of Florida denied Wrigley's motion to dismiss the FDUTPA claim because "Florida courts have allowed diminished value to serve as 'actual damages' recoverable in a FDUTPA claim." Id. at 1339 (quoting Collins, 894 So. 2d at 990). The court explained that the plaintiff did not have to suffer "actual out of pocket losses." Id. at 1339-40. Furthermore, the court declined to dismiss the plaintiffs' breach of warranty claim "[f]or the reasons discussed" with respect to the FDUTPA claim. Id. at 1341. Similarly, in Pelkey v. McNeil Consumer Healthcare, No. 10-61853-CIV-DIMITROULEAS, 2011 U.S. Dist. LEXIS 21372, at *11-18 (S.D. Fla. Feb. 15, 2011), the Southern District of Florida denied a motion to dismiss FDUTPA and breach of express warranty claims based on the plaintiffs' allegation that they paid a price premium for mouthwash that was falsely advertised as "fight[ing] unsightly plaque." The court relied on Smith in declining to dismiss the claims. Id. In Dorestin v. Hollywood Imports, Inc., 45 So. 3d 819 (Fla. Dist. Ct. App. 2010) (Gross, C.J., concurring), the Florida Fourth District Court of Appeal outlined the legislative intent of

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[17] In addition, Plaintiffs cite Rothstein v. DaimlerChrysler Corp., No. 8:05CV1126T30MSS, 2005 WL 3093573, at *2 (M.D. Fla. Nov. 18, 2005), in which the Middle District of Florida relied in part on Collins in denying a motion to dismiss a FDUTPA claim that was based on alleged misrepresentations and omissions regarding defective front brake assemblies on Jeep vehicles. However, Rothstein was decided before Kia Motors.

FDUTPA. The court explained that FDUTPA does not define "actual damages," but the statute should "be construed liberally" to make consumers whole. Id. at 826. After citing Collins with approval, the court noted that "other states have not followed Florida's lead and have limited the definition of 'actual damages' in consumer protection statutes analogous to FDUTPA." Id. at 828. The FDUTPA claim in Dorestin was based on deceptive acts related to the sale of used cars. Id. at 820-22.

None of the post-Kia Motors cases relied on by Plaintiffs involved the manifestation of defect issue, and economic loss is not a substitute for manifestation. (Reply at 7 n.11.) For this reason, the Court finds them uninstructive here. On the other hand, both Brisson and Breakstone involved an alleged vehicle defect, and both courts concluded that Florida law requires plaintiffs to allege manifestation of a defect to recover economic losses. Brisson, 349 F. App'x at 434-35; Breakstone, 2010 WL 2164440, at *6. It appears, then, that courts applying Florida law have followed Kia Motors rather than Collins in the context of alleged vehicle defects.[18] It does not matter whether the alleged defects in Brisson and Breakstone could have led to sudden, unexpected, and

[18] The District of New Jersey recently noted that "[n]o court has applied the reasoning of the appellate court in Kia Motors to flatly preclude recovery for diminished resale value and other economic damages . . . ." In re Ford Motor Co. E-350 Van Prods. Liability Litig. (No. II), No. 03-4558 (GEB), 2010 WL 2813788, at *46 (D.N.J. July 9, 2010), amended on other grounds, CIV.A. 03-4558 GEB, 2011 WL 601279 (D.N.J. Feb. 16, 2011). But the court did not indicate that it would not "apply Kia Motors as a blanket prohibition against the maintenance of any of the Florida Plaintiffs' claims." See id. It avoided the issue because all of the claims failed on other grounds. Id.

catastrophic consequences.[19] (See Opp'n at 9-10.) Judge Easterbrook's rationale for the majority rule, adopted by the Kia Motors court, made no distinction between defects that could lead to sudden, unexpected, and catastrophic consequences, and those that could not.

3. Conclusion Regarding Manifestation of Defect Under Florida Law

The Court's task here is to predict how the Florida Supreme Court would resolve the manifestation of defect issue. For the foregoing reasons, the Court concludes that in a vehicle defect case, it would follow Kia Motors and require the Florida Plaintiffs to allege manifestation of the SUA defect in order to sufficiently state actionable claims under Florida law.

B. New York

After the voluntary dismissal without prejudice of the claims of Plaintiff Ada Morales (see Docket No. 2206), the remaining New York Class Representatives are Rocco and Bridie Doino, John and Mary Laidlaw, and Judy Veitz (see Class ID

[19] At the hearing, Plaintiffs also attempted to distinguish Kia Motors by arguing that the plaintiffs there, unlike the under the allegations in the present case, received some form of warning before they were faced with a life-threatening situation, i.e., total brake failure. (04/23/2012 Tr. at 13.)

Statement at 15).[20] Of these Plaintiffs, only the Doinos' vehicle has manifested a SUA defect. (SAMCC ¶¶ 44, 56; Danziger Compl. ¶ 41.)

As set forth below, the Court concludes that the claims of John and Mary Laidlaw are precluded in light of their failure to allege that their vehicle manifested a SUA defect. However, the Court also concludes that because Judy Veitz alleges that she traded in her Prius for a reduced amount because of the alleged defect, her claims are not precluded.

In 2002, the New York Appellate Division considered the issue of whether a latent defect in a consumer product — i.e., a defect that has not manifested itself — is actionable under New York law. Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (2002). There, the court considered the pleading sufficiency of claims premised on an alleged design defect in the vehicles of three manufacturers that caused rearward collapse of the front seat backrests in the event of a rear-end collision. Id. at 119-20. The court rejected the argument that the plaintiffs' claims could be premised on mere "economic loss," and instead concluded that the plaintiffs' claims of negligence, strict liability, breach of implied warranty, negligent misrepresentation, fraud, and for violations of Gen. Bus. Law § 349 and § 350 were precluded because of the plaintiffs' failure to "plead actual injuries or damages, resulting from defendants' conduct." Id. at 121.

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[20] As with the Florida Plaintiffs, Toyota identifies a larger group of Plaintiffs. (Compare Class ID Statement at 15 (identifying six New York Class Representatives related to four vehicles) with Dawson Decl. Ex. B-1 (identifying nineteen Plaintiffs)). At this time, the Court discusses only those Plaintiffs who are identified in the Class ID Statement.

In doing so, the Frank court relied on a number of federal cases that applied New York law and arrived at the same conclusion. For instance, the Frank court relied on Feinstein v. Firestone Tire & Rubber, Inc., 535 F. Supp. 595 (S.D.N.Y. 1982), in which the court held that claims based on unmanifested defects could not be maintained. Frank, 292 A.D.2d at 122-23. The Frank court noted that the Feinstein court so concluded notwithstanding substantiation by federal government agencies of cases in which the defects had manifested themselves, and to tragic results. Frank, 292 A.D.2d at 122-23.

The Frank court also relied on Weaver v. Chrysler Corp., 172 F.R.D. 96, 99-100 (S.D.N.Y. 1997), which arrived at a similar conclusion, precluding the claims of plaintiffs who alleged an unmanifested defect in integrated child safety seats. Similarly, the Frank court took note of Hubbard v. General Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, *3-4 (S.D.N.Y. May 22, 1996), in which the plaintiff alleged an unmanifested brake defect that adversely affected the vehicles' resale and trade-in value. Noting the claim was deficiently pled, the court dismissed the claim because the plaintiff did not allege that his brakes failed, but expressly permitted the plaintiff to amend his complaint to cure this deficiency when he indicated that a manifestation of this defect led him to take the vehicle to the dealer for repair. Id.

On these authorities, and similar authorities in other jurisdictions, the Frank court concluded that, in the absence of a manifested defect that resulted in property damage or personal injury, and in the absence of allegations that the plaintiffs

attempted to sell or sold a vehicle at a financial loss as a result of the alleged defect, the plaintiffs could not maintain their claims. Frank, 292 A.D.2d at 128.

The Court reaches a similar conclusion today. It is clear that, "giving 'proper regard' to" the relevant rulings applying New York law as required by Estate of Bosch, 387 U.S. at 465, the New York Class Representatives may not maintain their claims against the Toyota Defendants in the absence of allegations regarding a manifested defect or the actual or attempted resale of a vehicle that reflects a loss in value as a result of the defect.

Plaintiffs have not cited authority that sets forth a contrary holding, and the Court, in its own research, has found none. The Frank court looked to the laws of other jurisdictions, and its conclusion, and the Court's conclusion today, are in accord with the weight of the case law. See, e.g., Briehl v. General Motors Corp., 172 F.3d 623, 627 (8th Cir. 1999) (collecting cases).

Plaintiffs argue generally that they were damaged by the failure of their vehicles to "hold their resale and trade-in values." (Opp'n at 15.) Only one Plaintiff,[21] Veitz, alleges such damages. (See Danziger Complaint ¶ 41.) Veitz alleges that she traded in her Prius and "received far less than she would have expected for the Prius if it had not been prone to SUA." (Id.) The otherwise vague

[21] Two other Plaintiffs, the Laidlaws, abandoned their vehicle on the dealer's lot when the dealer refused to refund their purchase price or provide a replacement vehicle. (See SAMCC ¶ 56.) Their claims are therefore not subject to the same analysis as are Veitz's claims.

language of this allegation, and the subjective nature of Plaintiff Veitz's experience, finds more concreteness in the more detailed allegations regarding an objectively measurable drop in resale value. (See e.g., SAMCC ¶¶ 372-78.)

The question becomes, then, whether a Plaintiff's allegations regarding a loss in resale value is sufficient to maintain a claim under New York law notwithstanding the inability to allege the manifestation of a defect. The Court again looks to cases decided under New York law.

Toyota appears to contend that a district court in New York has impliedly rejected the proposition that the realization of a loss on resale could support the claims of a plaintiff whose vehicle had not manifested a defect. (See Reply at 4 n.5.) Toyota finds significant the Hubbard court's failure to consider defendant's arguments that the plaintiff had not attempted to resell his vehicle in light of that court's requirement that the plaintiff allege manifestation. (Id. (characterizing the court's decision as "ignoring" the argument that plaintiff had not attempted to resell his vehicle, implying the issue is completely irrelevant).) However, when the Hubbard court dismissed the plaintiff's claim and required that he replead manifestation, it understood the plaintiff was prepared to so claim. 1996 WL 274018 at *3. The court noted, but did not discuss, the defendant's argument that the plaintiff failed to allege an attempt to resell the vehicle. Id. at *3-4. Knowing the plaintiff was prepared to allege manifestation, there was simply no reason for the court to consider whether the plaintiff could assert a claim on this alternative basis. Thus, this Court cannot glean any meaning from Hubbard on the issue of whether allegations of resale save an otherwise unactionable claim regarding an

unmanifested defect.

The Frank decision, the sole state-court decision on the precise issue before the Court, clearly viewed a financial loss that had actually been recognized on sale as a factor relevant to whether a claim under New York law could be asserted. Frank, 292 A.D.2d at 128. In the summation of the court's rationale in affirming the dismissal of all claims, the Frank court expressly recognized the failure to allege an attempt to sell or an actual sale that resulted in financial loss attributable to the defect. Frank, 292 A.D.2d at 128. Although not dispositive, this discussion tends to weigh in favor of Plaintiffs' position that a loss recognized on resale could be actionable.

So too does the Frank court's discussion regarding the public policy consideration underlying the manifestation requirement: The unfairness of "requir[ing] a manufacturer to become . . . an indemnifier for a loss that may never occur." Id. at 127. Taken to its logical extreme, according to the Frank court, such suits could lead to claims based on no more than a better design merely envisioned by the plaintiffs. Id. Such claims would "have a profound effect on the marketplace [because] they would increase the cost of manufacturing, and therefore the price of everyday goods." Id. Those claims would not benefit anyone other than "the lawyers handling the case and perhaps the few consumers directly involved in the litigation." Id. (internal quotation marks and citation omitted). Although this is a concern where no defect is manifested and no actual economic loss is realized, the envisioned fear of lawsuits based on no more than speculative damages that would tend to adversely shape the marketplace is simply

not implicated where a claim is based on a loss recognized on the sale or attempted sale of the vehicle.

This policy discussion by the Frank court also tends to refute Plaintiffs' attempt at oral argument to distinguish the present case on its facts. (See 04/23/2012 Tr. at 17.) Specifically, Plaintiffs focused on the characteristics of the particular defects alleged: the numbers of injuries and deaths allegedly attributable thereto, the replication of SUA by dealers, and the inability to repair the defect. However, when viewing the manifestation requirement as supported by the identified public policy, there is no indication that the Frank court would have relaxed the manifestation requirement based on either the extent of the risk or the relative strength of a plaintiffs' case. To the contrary, the Frank case itself involved a safety defect whose manifestation had the potential for life-altering injuries. Frank, 292 A.D.2d at 120. Moreover, the Frank court also identified an alternative (and preferable) avenue for plaintiffs to seek redress (petitioning NHTSA), further suggesting that Plaintiffs' attempt to distinguish the present case from Frank would be seen by New York courts as unavailing. Id. at 128.

The Frank court relied on Briehl, 172 F.3d at 628-29, expressly noting Briehl's discussion regarding the failure to allege "that anyone actually sold a car at a reduced value" in finding that no claim was stated based on an alleged drop in resale value. Frank, 292 A.D.2d at 125 (citing Briehl). This express recognition, especially when coupled with the Frank court's discussion regarding the absence of allegations of attempts to resell the vehicles found in the Frank court's summation of its holding, is a telling indication of the significance that the Frank court

attaches — and thus, a telling indication of the significance New York law generally attaches — to allegations regarding attempts to resell or actual resale of vehicles. Id. at 125, 128.

The sole factor weighing against Toyota's position is the discussion in Frank that seems to suggest that New York courts should, in the absence of a manifested defect, defer to the National Traffic and Motor Vehicle Safety Act provisions that permit interested persons to petition for an investigation by the National Highway Traffic Safety Administration ("NHTSA") into motor vehicle safety defects. Id. at 127-28. This discussion, however, appears to the Court to be an acknowledgment by the Frank court that motor vehicle safety is of paramount concern, but that avenues other than a civil action for damages for an inchoate loss in value are available.

Thus, on balance, the Court concludes that the highest court of the state of New York would be likely to find actionable those claims based on a financial loss because of the alleged defect, as reflected in a reduced value on sale. Thus, Plaintiff Veitz's claims may proceed and are not barred on the basis that she did not experience an SUA defect. Conversely, because the Laidlaws' allegations are devoid of such allegations, their claims based on an unmanifested defect must be dismissed.

In sum, as under Florida law, the Court's task here is to predict how the highest court of the State of New York would resolve the manifestation of defect issue. For the foregoing reasons, the Court concludes that in a vehicle defect case,

the only Plaintiffs who may assert actionable claims under New York law are those that have either experienced a manifested defect, or have experienced a recognized loss on sale as a result of the unmanifested defect.[22]

IV. Consumer Protection Statutory Claims

A. Florida

Plaintiffs assert claims under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201-501.213. (SAMCC ¶¶ 888-95; Danziger Compl. ¶¶ 433-40; Gudmundson Compl. ¶¶ 103-10.) Because the Court has dismissed all claims of the Florida Plaintiffs who do not allege manifestation of the SUA defect, the Court's analysis here applies only to those FDUTPA claims that remain.

Toyota argues that the Plaintiffs' FDUTPA claims must be dismissed to the extent they are based on the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 (the "TREAD Act"), 49 U.S.C. §§ 30101-30170.[23]

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[22] The Court's conclusions under both Florida and New York law regarding the issue of manifestation are not claim specific. Thus, manifestation is required for any claim Plaintiffs assert under Florida law, and manifestation or recognized loss on sale is required for any claim Plaintiffs assert under New York law.

[23] Toyota seeks dismissal of only those FDUTPA claims based on the TREAD Act. Plaintiffs have identified two Florida Consumer "TREAD Act Subclasses" that assert FDUTPA claims based on TREAD Act violations. (Danziger Compl. ¶ 320(B); see also Class ID Statement.) Plaintiffs contend that

(Motion at 18-23.) More specifically, Toyota argues that the FDUTPA claims fail as a matter of law because (1) most of the Plaintiffs' allegations do not involve conduct regulated by the TREAD Act; (2) to the extent that Plaintiffs' allegations involve the TREAD Act, such conduct cannot serve as a predicate for a violation of FDUTPA because the TREAD Act does not regulate deceptive acts or unfair practices; and (3) Plaintiffs have not adequately alleged causation based on any violation of the TREAD Act. (Id. at 19.) On the other hand, Plaintiffs argue that Toyota's alleged TREAD Act violation gives rise to their FDUTPA claims. (Opp'n at 17.) For the following reasons, the Court finds that Plaintiffs sufficiently state their FDUTPA claims.

The Court previously found that a TREAD Act violation can serve as a basis for claims under California's Consumer Legal Remedies Act (the "CLRA"). (Docket No. 1414 & 1623 at 40-41.) The Court agreed with Plaintiffs that Toyota violated its duty to report safety-related information that would be material to a reasonable consumer, and it did not matter that Toyota's duty was "to NHTSA rather than consumers." (Id.) The Court also agreed with Plaintiffs that Toyota had a duty to disclose its noncompliance with the TREAD Act. (Id.) Plaintiffs contend that these previous "rulings apply equally here." (Opp'n at 18.) Although

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Toyota "essentially concedes that the Florida Plaintiffs state a claim for violation of FDUTPA" because "Toyota merely insists that one of Plaintiffs' allegations — that Toytoa violated [the TREAD Act] — does not support them." (Opp'n at 17.) Toyota disputes Plaintiffs' contention that there is no dispute that some of Plaintiffs' allegations state a FDUTPA claim (id.), but acknowledges that a finding that Plaintiffs cannot base their FDUTPA claims on TREAD Act violations would not result in dismissal of all of Plaintiffs' FDUTPA claims (Reply at 14).

these rulings with respect to California consumer protection statute claims may be instructive, the Court must consider Toyota's Florida-specific statutory argument.

The TREAD Act was enacted in 2000. The Act creates "early warning reporting requirements," in which automobile manufacturers must submit various types of data to NHTSA. See, e.g., 49 U.S.C. § 30166(m); id. at (m)(3)(A). Specifically, automobile manufacturers must submit, within five days of initiating a foreign recall on equipment identical or substantially similar to a motor vehicle or motor vehicle equipment offered for sale in the United States, a report to NHTSA. 49 U.S.C. § 30166(l)(1).

In order to successfully assert a claim under FDUTPA, a plaintiff must prove: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." Rollins, Inc.v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). Under section 501.203(3)(c), a violation of FDUTPA may be based on "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." Fla. Stat. § 501.203(3)(c). Where a FDUTPA claim is based on violation of another statute, the "borrowed" statute must be one prohibiting "unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." Id.; see also Edgewater by the Bay, LLLP v. Gaunchez (In re Edgewater by the Bay, LLLP), 419 B.R. 511, 515-16 (Bankr. S.D. Fla. 2009) ("Violations of laws or statutes that give rise to a FDUTPA claim must be of the kind that proscribe unfair trade practices or unfair methods of competition . . . ."). Although the language of section 501.203(3)(c) is broad in scope, courts applying Florida law have rejected arguments that a

violation of any statute or rule providing consumer protection establishes a per se violation of FDUTPA. See id. at 516; Double AA Int'l Inv. Grp., Inc. v. Swire Pac. Holdings, Inc., 674 F. Supp. 2d 1344, 1358 (S.D. Fla. 2009).

1. Alleged Violations of the TREAD Act

Toyota's first purported ground for dismissal of Plaintiffs' FDUTPA claims is that Plaintiffs do not allege a violation of the TREAD Act in their FDUTPA claims. Toyota argues that "Plaintiffs' purported incorporation by reference of all previous allegations into their FDUTPA claims is insufficient to base their FDUTPA claims on the TREAD Act." (Motion at 21-22.) The Court disagrees. Plaintiffs allege a violation of the TREAD Act as a basis for their FDUTPA claims. (E.g., Danziger Compl. ¶ 320(B); SAMCC ¶¶ 422, 888.). Although it is true that federal courts generally frown upon incorporation by reference of all previous allegations in a complaint, see Cannon v. Metro Ford, Inc., 242 F. Supp. 2d 1322, 1332 n.2 (S.D. Fla. 2002), given the length and complexity of the operative Complaints here, the pleading technique of incorporation by reference is acceptable. Accordingly, the Court rejects Toyota's first purported ground for dismissal of Plaintiffs' FDUTPA claims.

2. Deceptive Act or Unfair Practice

Toyota's second purported ground for dismissal of Plaintiffs' FDUTPA claims is that a violation of the TREAD Act cannot serve as a predicate for a violation of FDUTPA because the TREAD Act does not regulate deceptive acts or

unfair practices. According to Toyota, and as far as this Court is aware, no court applying Florida law has ever cited the TREAD Act as a FDUTPA predicate. (Motion at 21.) This does not mean, however, that a violation of the TREAD Act cannot form the basis for a FDUTPA claim.

The TREAD Act undoubtedly provides "some benefit to consumers," see In re Edgewater by the Bay, LLLP, 419 B.R. at 515, but the Court must determine whether it falls within the ambit of FDUTPA. The Court finds that it does. One of the main purposes of the TREAD Act is to enable the NHTSA to "warn consumers of potential defects in vehicles," see Seiter v. Yokohama Tire Corp., No. C08-5578 RBL, 2010 U.S. Dist. LEXIS 9266, at *7 n.1 (W.D. Wash. Feb. 3, 2010), thereby regulating the deceptive act and unfair practice of selling such vehicles to unknowing consumers, see In re Edgewater by the Bay, LLLP, 419 B.R. at 516 (defining a "deceptive act" as "one that is likely to mislead consumers" and an "unfair practice" as one "that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (internal quotation marks and citation omitted)). By failing to comply with the TREAD Act, Toyota was able to sell vehicles to Florida consumers who claim they would not have bought them had they been aware of the SUA defect (see SAMCC ¶ 66; Danziger Compl. ¶¶ 35-38, 40; Gudmundson Compl. ¶ 108).

3. Causation

Toyota's third purported ground for dismissal of Plaintiffs' FDUTPA claims is that Plaintiffs' do not allege that the TREAD Act violation caused their injuries. (Motion at 22.) To recover "actual damages" under FDUTPA, a plaintiff must have suffered a loss "as a consequence of a violation of the statute." City First Mortg. Corp. v. Barton, 988 So. 2d 82, 86 (Fla. Dist. Ct. App. 2008) (quoting Smith v. 2001 S. Dixie Highway, Inc., 872 So. 2d 992, 993 (Fla. Dist. Ct. App. 2004)). Toyota argues that "[e]ven if Toyota violated the TREAD Act, . . . any such violation would not have a causal relationship to Plaintiffs' alleged injuries because the TREAD Act does not create a duty to report information to prospective customers." (Motion at 22.) But the Court has already rejected Toyota's argument that the public cannot be misled by failure to make disclosures to NHTSA pursuant to the TREAD Act. (See Docket 1414 at 39-40.) Furthermore, courts applying Florida law have explained that FDUTPA does not impose a requirement of reliance-in-fact. Feheley, 2009 WL 2474061, at *5. Rather, the question is "whether the practice was likely to deceive a consumer acting reasonably in the same circumstances." See Office of Attorney Gen., Dep't of Legal Affairs v. Wyndham Int'l, Inc., 869 So.2d 592, 598 (Fla. Dist. Ct. App. 2004). Reasonable consumers could be misled by the alleged failure to disclose material safety-related information to NHTSA.

4. Conclusion as to Florida Statutory Claims

For the foregoing reasons, the Court denies Toyota's motion to dismiss as to the Florida Plaintiffs' FDUTPA claims.

B. New York

Plaintiffs assert claims under the New York Consumer Protection Act ("NYCPA"), N.Y. Gen. Bus. Law §§ 349-350. (SAMCC ¶¶ 2128-43; Danziger Compl. ¶¶ 479-94.) Because the Court has dismissed the claims of certain New York Plaintiffs who do not allege manifestation of a defect, the Court's analysis here applies only to those NYCPA claims that remain.

In order to state a claim under section 349 or section 350, Plaintiffs must allege "(1) that the act, practice or advertisement was consumer-oriented; (2) that the act, practice or advertisement was misleading in a material respect; and (3) that [they were] injured as a result of the deceptive practice, act or advertisement." Stutman v. Chem. Bank, 731 N.E.2d 608, 611 (N.Y. 2000); Leider v. Ralfe, 387 F. Supp. 2d 283, 292 (S.D.N.Y. 2005). In addition, section 350 requires that Plaintiffs allege reliance on false advertisements. Leider, 387 F. Supp. 2d at 292.

Toyota argues that Plaintiffs' NYCPA claims must be dismissed for three reasons: (1) the NYCPA claims of certain Plaintiffs are barred by the relevant statute of limitations; (2) Plaintiffs have failed to adequately allege that Toyota's acts or omissions were materially deceptive; and (3) Plaintiffs' section 350 claims

fail to adequately allege reliance. (Motion at 11-12.) The Court addresses each argument in turn.

1. Statute of Limitations

The statute of limitations for all claims under the NYCPA is three years. See N.Y. C.P.L.R. § 214(2); Gristede's Foods, Inc. v. Unkechauge Nation, 532 F. Supp. 2d 439, 452-53 (E.D.N.Y. 2007) ("New York courts have uniformly applied a three-year statute of limitations to section 349 and section 350 cases."). Neither party disputes this. However, the parties dispute whether the three-year statute of limitations has expired as to certain New York Plaintiffs. Toyota contends that the statute "began to run at the time of purchase," requiring dismissal of a number of Plaintiffs' claims. (Motion at 13.) Accordingly, "the NYCPA claims of Plaintiff Veitz and all other New York Plaintiffs who purchased vehicles before November 2006 . . . must be dismissed." (Id.) Plaintiffs respond that the statue was tolled under the theory of equitable estoppel and, therefore, "[a]ll of the New York Plaintiffs' [NYCPA] claims . . . are timely." (Opp'n at 19-20.)

The statute of limitations for claims under the NYCPA accrues "when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief." Gaidon v. Guardian Life Ins. Co. of Am., 750 N.E. 2d 1078, 1083 (N.Y. 2001). Here, the statute of limitations began to run at the time of purchase. See Schandler v. N.Y. Life Ins. Co., No. 1:09-cv-10463, 2011 WL 1642574, at *4-5 (S.D.N.Y. Apr. 26, 2011) (statute of limitations began to run when plaintiff was delivered an insurance policy without certain terms

that she was allegedly promised); Statler v. Dell, Inc., 775 F. Supp. 2d 474, 484 (E.D.N.Y. 2011) (statute of limitations began to run when computers with defective capacitors were delivered). Therefore, absent equitable tolling, the NYCPA claims of Plaintiffs who purchased their vehicles before November 2006 are time-barred.

Under New York law, a statute of limitations may be tolled under the theory of equitable estoppel.[24] Drake v. Lab. Corp. of Am. Holdings, No. 02-CV-1924 (FB) (RML), 2007 U.S. Dist. LEXIS 17430, at *20 (E.D.N.Y. Mar. 13, 2007). Equitable estoppel may prevent a defendant from pleading the statute of limitations "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." Id. (quoting Simcuski v. Saeli, 44 N.Y.2d 442, 448-50 (1978)). To apply equitable tolling, Plaintiffs "must be able to show that [Toyota] wrongfully concealed its actions, such that [Plaintiffs were] unable, despite due diligence, to discover facts that would allow [them] to bring [their] claim[s] in a timely manner or that [Toyota's] actions induced [Plaintiffs] to refrain from commencing a timely action." See Statler, 775 F. Supp. 2d at 482-84 (expressly recognizing that equitable tolling may apply in the context of a section 349 claim, even though "[a]ccrual [of an NYCPA claim] is not dependent upon any later date when discovery of the alleged deceptive practice is said to occur").

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[24] Equitable estoppel is a term that has been used by New York courts to describe circumstances of fraudulent concealment of a cause of action as well as circumstances where a plaintiff is aware of the existence of his cause of action, but the defendant's conduct caused him to delay in bringing his lawsuit. Pearl, 296 F.3d at 82. It is distinct from the "discovery rule" in that it focuses on the defendant's conduct rather than the plaintiff's conduct.

The New York Plaintiffs do not specifically plead that Toyota's active concealment of the SUA defect prevented them from discovering facts that would have allowed them to bring their claims in a timely manner. (See SAMCC ¶¶ 2128-43; Danziger Compl. ¶¶ 479-94.) Therefore, the Court dismisses the NYCPA claims of all Plaintiffs who purchased their vehicles before November 2006 as time-barred. However, these Plaintiffs are granted leave to amend.

2. Materially Deceptive Act or Practice

Toyota argues that Plaintiffs' NYCPA claims fail as a matter of law because none of the New York Plaintiffs allege they were misled by a specific advertisement. (Motion at 14.) Toyota further argues that the New York Plaintiffs' claims fail because none of Toyota's advertising claims regarding the safety and reliability of its vehicles were materially misleading or deceptive under New York Law. (Id. at 15.) Finally, Toyota argues that the New York Plaintiffs' omissions claims based on Toyota vehicles' lack of a brake override system ("BOS") should be dismissed because "Toyota had no duty to promote its competitors' products or to disparage its own." (Id. at 17.)

Plaintiffs argue that "[t]he New York Plaintiffs can base their § 349 claim on the same material omissions that, this Court ruled, state a claim for violating California consumer-protection acts. Toyota's material nondisclosure that violated the TREAD Act also violates § 349." (Opp'n at 20.)

Plaintiffs need not allege reliance on a particular misrepresentation in order

to assert a section 349 claim. Stutman, 731 N.E.2d at 612 ("[R]eliance is not an element of a section 349 claim.").[25] Plaintiffs must only show causation between the materially deceptive act or omission and the alleged injury. See id. In Stutman, "plaintiffs allege[d] that defendant's material deception caused them to suffer a [monetary] loss," which satisfied section 349's causation requirement. Id. at 613. Similarly, here, the New York Plaintiffs allege that Toyota's failure to disclose material information regarding the SUA defect caused them to overpay for their vehicles. (SAMCC ¶ 2135; Danziger Compl. ¶ 486.). The Court finds this sufficient for causation under section 349.

The authorities cited by Toyota do not convince the Court that Plaintiffs' section 349 claims fail because Plaintiffs do not point to a specific advertisement. In Leider, 387 F. Supp. 2d at 292, the court noted that "§ 350 requires — unlike § 349 — that the plaintiff must demonstrate reliance on the allegedly false advertising." Accordingly, the typical requirement that plaintiffs "point to [a] specific advertisement or public pronouncement" applies only to section 350 claims. Id. (quoting Small, 252 A.D.2d at 9.) Toyota also relies on Small v. Lorillard Tobacco Co., 679 A.D.2d 1 (N.Y. App. Div. 1998). This case provides an example of what the Stutman court pointed out with respect to confusion among the appellate courts as to the proper standard for section 349 claims. On appeal, the New York Court of Appeals noted that reliance is not an element of a section

[25] In Stutman, the Court of Appeals of New York noted that "the [New York] Appellate Division has occasionally applied the incorrect standard in section 349 cases, imposing a reliance requirement when in fact there is none." Stutman, 731 N.E.2d at 612 n.1. The confusion arises because "[r]eliance and causation are twin concepts, but they are not identical." Id. at 613.

349 claim, but affirmed dismissal of the plaintiffs' section 349 claim on a different ground. Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 897 (N.Y. 1999). In Solomon v. Bell Atl. Corp., 9 A.D.3d 49, 52-53 (N.Y. 2004), the New York Court of Appeals decertified a class of plaintiffs asserting section 349 and 350 claims because they had "not demonstrated that all members of the class saw the same advertisements." But unlike Solomon, where the "advertising varied widely," id. at 53, here, all Plaintiffs allege they were exposed to advertisements claiming that Toyota vehicles were safe and reliable.[26]

Furthermore, the Court does not agree with Toyota that its claims regarding safety and reliability constitute nonactionable puffery under New York law. (See Motion at 15.) Advertising a car as safe and reliable when it actually has a safety-related defect that may render it unable to stop is not "within the tolerable range of commercial puffery," especially because Toyota allegedly had exclusive knowledge of the SUA defect. Compare Am. Home Prods. v. Johnson & Johnson, 654 F. Supp. 568, 580 (S.D.N.Y. 1987) (finding that general claims of "a superior safety profile" were mere puffery because they were not likely to mislead).

[26] The Court need not address whether the New York Plaintiffs alleged violations of the TREAD Act as a basis for their section 349 claims because the Court finds they sufficiently stated a section 349 claim without any TREAD Act allegations.

3. Section 350 Reliance

Toyota argues that Plaintiffs' section 350 claims fail "because they do not sufficiently allege reliance on any given advertisement." (Motion at 17.) Furthermore, "because there are a wide variety of factors that could have influenced Plaintiffs' decisions to purchase or lease the vehicles, Plaintiffs are not entitled to a presumption of reliance." (Id. at 18.)

Plaintiffs argue that the New York standard for reliance under section 350 is similar to the California standard for reliance under its consumer-protection statutes, and the Court has already found that Plaintiffs' allegations of reliance on Toyota's deceptive advertising campaign are sufficient under California law. (Opp'n at 23.) Plaintiffs also contend that reliance will be inferred under New York law where a defendant controls all the information about a transaction. (Id. at 24-25.)

Section 350 imposes a requirement not included in a section 349 claim, namely, that the plaintiff relied on the allegedly false advertising. Leider, 387 F. Supp. 2d at 292. "Typically, this means that the plaintiff must 'point to [a] specific advertisement or public pronouncement' upon which he or she relied." Id. (emphasis added) (quoting Small, 252 A.D.2d at 9.) Vague allegations of reliance are insufficient. Pelman ex rel. Pelman v. McDonald's Corp., No. 02 CIV 7821, 2003 WL 22052778, at *8 (S.D.N.Y. Sept. 3, 2003), vacated in part, 369 F.3d 508.

At the hearing, Toyota urged the Court to reconsider its reliance in the

Tentative Ruling on Ackerman v. Coca-Cola Co., No. CV-09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156 (E.D.N.Y. July 21, 2010), in which the Eastern District of New York concluded that the same allegations deemed sufficient to plead reliance under California's UCL were sufficient to plead reliance under section 350. (See 04/23/2012 Tr. at 8-9.) Toyota argued that the Ackerman court's reliance on Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005), was ill-founded. (See 04/23/2012 Tr. at 8-9.)

The plaintiffs in Pelman filed a putative class action complaint alleging, inter alia, violations of section 349 and section 350 based on McDonald's misrepresentations about the nutritional value of its food products. See id. at 509. Because the plaintiffs did not include "any express allegation that any plaintiff specifically relied to his/her detriment on any particular representation made in any particular McDonald's advertisement or promotional material," the district court dismissed, with one exception, the section 350 claims. Id. at 510. On appeal, the plaintiffs argued only that the district court improperly dismissed their section 349 claims; accordingly, the Second Circuit regarded the plaintiffs' challenge to the dismissal of their section 350 claims as abandoned. Id. at 511.

At the hearing, Toyota also noted a case recently decided by the Eastern District of New York, Prue v. Fiber Composites LLC, No. 11-CV-3304 (ERK)(LB), 2012 WL 1314114 (E.D.N.Y. Apr. 17, 2012). (See 04/23/2012 Tr. at 9-10.) In Prue, the plaintiffs alleged that a manufacturer of decking materials made misrepresentations and false statements about the "quality, character and durability" of its materials, which were used to build a deck at the plaintiffs'

residence. Id. at *1, *8. The court dismissed the section 350 claim because the plaintiffs did not allege "what exactly th[e] misrepresentations and false statements were, nor [did] they even hint at how they were materially misleading or deceptive." Id. at *8.[27] Accordingly, it was impossible for the court to determine whether the misrepresentations and false statements were likely to mislead a reasonable consumer. Id. The plaintiffs also "fail[ed] to point to a 'specific advertisement or public pronouncement' upon which they relied." Id. (quoting Leider, 387 F. Supp. 2d at 292).

The Court previously found that all Plaintiffs "allege that they would have made a different purchasing decision but for Toyota's misrepresentations." (Docket No. 1623 at 31.) All Plaintiffs further allege that they "saw advertisements for Toyota vehicles on television, in the news, on billboards, in brochures at the dealership, on the Internet, and/or on banners in front of the

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[27] Specifically, the plaintiffs alleged:

> (1) that Fiber Composites' website featured advertisements for the subject decking materials, (2) that these website advertisements misrepresented and constituted false statements regarding the decking materials' "quality, character and durability," (3) that the plaintiffs were induced into relying on these misrepresentations and false statements, (4) that the plaintiffs were misled as to these three characteristics of the decking materials, and (5) that the plaintiffs sustained "severe economic losses" as a result.

Prue, 2012 WL 1314114, at *8.

dealership that touted the safety and reliability of the vehicles."[28] (Id. at 30-31.)

After considering Toyota's arguments regarding Ackerman and Prue, the Court nonetheless finds that the New York Plaintiffs' have sufficiently stated claims under section 350. Although the New York Plaintiffs do not provide the specifics of each advertisement upon which they relied, they allege reliance on Toyota's misrepresentations — made in various advertisements — that its vehicles were safe and reliable. See Batas v. Prudential Ins. Co. of Am., 281 A.D.2d 260, 261 (N.Y. App. Div. 2001) (concluding that section 350 claims were properly sustained by the lower court in part because plaintiffs "are not required at the pleading stage to set forth with particularity the materials they relied on"). Plaintiffs' allegations are specific enough to allow the Court to evaluate whether Toyota's misrepresentations would be likely to mislead consumers. Compare Prue, 2012 U.S. Dist. LEXIS 54027, at *23-24.

Even if Plaintiffs did not sufficiently plead reliance on Toyota's misrepresentations, because Toyota "effectively controlled all the information about the transaction," see Small, 252 A.D.2d at 8, Plaintiffs are entitled to a presumption of reliance. As explained herein, Plaintiffs allege that Toyota fraudulently concealed information pertaining to the SUA defect from both NHTSA and consumers.

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[28] These allegations were deemed sufficient to plead reliance under California's UCL. (Docket No. 1623 at 30-31.)

4. Conclusion as to New York Statutory Claims

For the foregoing reasons, the Court denies Toyota's motion to dismiss as to the New York Plaintiffs' NYCPA claims.

V. Fraudulent Concealment (Florida)

The Florida Plaintiffs assert claims for fraudulent concealment. (SAMCC ¶¶ 933-40; Danziger Compl. ¶¶ 466-73.) Because the Court has dismissed all claims of the Florida Plaintiffs who do not allege manifestation of the SUA defect, the Court's analysis here applies only to those fraudulent concealment claims that remain.

Toyota argues that all claims for fraudulent concealment fail under Florida law because Plaintiffs fail to adequately allege reliance and causation.[29] (Not. of Motion at 7.) Accordingly, the Court must determine only whether the Florida Plaintiffs sufficiently state fraudulent concealment claims under that state's law.

[29] In their Notice of Motion, Toyota sets forth two additional grounds for dismissal, which they fail to support with argument. Thus, the Court does not consider those unsupported grounds. In the same vein, Plaintiffs argue that they sufficiently state fraudulent concealment claims under both New York and Florida law, and they specifically claim that "Toyota does not challenge the New York Plaintiffs' fraudulent concealment claim." (Opp'n at 49.) However, Toyota correctly points out that unlike the Florida Plaintiffs, the New York Plaintiffs did not assert fraudulent concealment claims in the first instance. (See SAMCC ¶¶ 2128-86; Danziger Compl. ¶¶ 479-525.) Thus, the Court's inquiry here is limited to the pleading sufficiency of a claim for fraudulent concealment under Florida law.

For the following reasons, the Court finds that they do.

To state a claim for fraudulent concealment under Florida law, a plaintiff must allege:

> (1) a misrepresentation (or omission) of a material fact; (2)(a) knowledge of the representor of the misrepresentation, or (b) representations made by the representor without knowledge as to either the truth or falsity, or (c) representations made under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof; (3) an intention that the representor induce another to act on it; and (4) resulting injury to the party acting in justifiable reliance on the representation.

Maison v. Ford Motor Co., No. 1:04-CV-041-SPM, 2005 WL 1684159, at *1 (N.D. Fla. July 7, 2005) (citing Albertson v. Richardson-Merrell, Inc., 441 So. 2d 1146, 1149-50 (Fla. Dist. Ct. App. 1983)). As noted previously, claims of fraudulent concealment are held to the standard of Rule 9(b), which requires that the circumstances of the alleged fraud be alleged with particularity (i.e., the "who, what, when, where, and how" of the fraud). Id.; Fed. R. Civ. P. 9(b).

A. Elements of Fraudulent Concealment and Particularity

The Court finds that the Florida Plaintiffs sufficiently allege each element of a claim for fraudulent concealment. First, they allege that Toyota failed to disclose material facts regarding the SUA defect. (SAMCC ¶ 935; Danziger Compl.¶ 468.)

Second, they allege that Toyota knew these material facts, and also knew these facts were not known or reasonably discoverable by Plaintiffs. (SAMCC ¶ 935; Danziger Compl. ¶ 468.) Third, Plaintiffs allege that Toyota "actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Plaintiffs . . . to purchase Defective Vehicles at a higher price." (SAMCC ¶ 936; Danziger Compl.¶ 469.) Finally, Plaintiffs allege that they justifiably relied on these omissions and were injured by paying more for their Toyota vehicles than they were worth. (SAMCC ¶¶ 938-39, Danziger Compl. ¶¶ 471-72.)

Further, Plaintiffs plead fraudulent concealment with the requisite particularity under Rule 9(b).[30] Their allegations include specific facts showing Toyota's knowledge and concealment of the alleged defect, including: concealment of technical service bulletins (SAMCC ¶ 175; Danziger Compl. ¶ 86), withholding knowledge of tens of thousands of consumer complaints potentially related to SUA (SAMCC ¶ 206; Danziger Compl. ¶ 121), failure to report replication of non-driver-error SUA event to NHTSA (SAMCC ¶ 208; Danziger Compl. ¶ 123), documenting SUA in "Field Technical Reports" and a "Dealership Report" that were not disclosed to consumers (SAMCC ¶¶ 209-14; Danziger Compl. ¶ 124-29), claiming lack of diagnostic code to cover up the alleged SUA defect (SAMCC ¶ 229; Danziger Compl. ¶ 144), concealment of 60,000 "surging" complaints

[30] The Court previously found that these factual allegations, which were also provided in the Economic Loss Master Consolidated Complaint (Docket No. 263), satisfy the particularity requirement of Rule 9(b). (Docket 510 at 79.) In the SAMCC and the Danziger Complaint, Plaintiffs include even more factual allegations supporting their fraudulent concealment claims. (E.g., SAMCC ¶ 305; Danziger Compl. ¶ 221.)

(SAMCC ¶ 236; Danziger Compl. ¶ 151), internally recognizing but not disclosing "[f]laws in Toyota Regulatory and Defect Process" (SAMCC ¶ 242; Danziger Compl. ¶ 157), withholding "Technical Information" bulletin and sticky accelerator information from U.S. distributors and consumers (SAMCC ¶¶ 277-78; Danziger Compl. ¶ 192-93), misstating that "no defect exists" and erroneously stating that NHTSA confirmed as much (SAMCC ¶¶ 279-80; Danziger Compl. ¶¶ 194-95), concealing the fact that "WE HAVE A tendency for MECHANICAL failure in accelerator pedals . . . . The time to hide on this one is over. We need to come clean . . . ." (SAMCC ¶ 292 (emphasis cited in SAMCC from underlying source); Danziger Compl. ¶ 207 (emphasis cited in Danziger Compl. from underlying source)), allegedly ignoring documents "contain[ing] preliminary fault analysis" (SAMCC ¶ 310; Danziger Compl. ¶ 228), and instructing quality control employees to cover up defects (SAMCC ¶ 321; Danziger Compl. ¶ 239), among others.

B. Toyota's Purported Grounds for Dismissal

Toyota offers two specific arguments for why the Florida Plaintiffs' fraudulent concealment claims should be dismissed. First, Toyota claims that Plaintiffs' "assertions assume that Toyota has an obligation to disclose to its customers that Toyota has chosen not to implement BOS, based on the fact that other manufacturers have implemented BOS."[31] (Motion at 45 (emphasis in

[31] In a claim for fraudulent concealment by omission, a defendant's knowing concealment of material facts may only support an action for fraud where there is a duty to disclose the information. Livingston v. H.I. Family Suites, Inc.,

original).) Plaintiffs make no such assumption. They specifically allege that Toyota had a duty to disclose material facts about the SUA defect because the facts "were known and/or accessible only to [Toyota]." (SAMCC ¶ 935; Danziger Compl. ¶ 468.) Furthermore, Plaintiffs allege that the "omitted facts were material because they directly impact the safety of the Defective Vehicles." (SAMCC ¶ 935; Danziger Compl. ¶ 468.) In fact, the Court has already ruled that Plaintiffs sufficiently allege that Toyota had a duty to disclose material facts about the SUA defect. (See Docket 510 at 42-43, 81-84). Toyota's argument focuses only on its failure to disclose that competitors were implementing BOS in their vehicles. But as Plaintiffs explain, the alleged "duty arises not solely from 'the fact that other manufacturers have implemented BOS . . . , but from the fact that the Defective Vehicles — unlike other manufacturers' vehicles — are prone to SUA." (Opp'n at 50 n.33.)

Second, Toyota argues that Plaintiffs' argument "assumes that they relied on Toyota's non-disclosure when deciding whether to purchase their vehicles and that they would not have purchased or paid as much had Toyota disclosed that it did not implement BOS in all its vehicles." (Motion at 45 (emphasis in original).) Again, the Court disagrees. Plaintiffs specifically allege that they "were unaware of [the] omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts." (SAMCC ¶ 938; Danziger Compl. ¶ 471.)

No. 6:05-CV-860-ORL19KRS, 2005 WL 2077315, at *4 (M.D. Fla. Aug. 29, 2005) (citing Don Slack Ins., Inc. v. Fidelity & Cas. Co. of N.Y., 385 So. 2d 1061 (Fla. Dist. Ct. App. 1980)).

C. Individual Reliance

Finally, the parties dispute whether Florida law requires a showing of individual reliance for fraudulent concealment claims. It does. Grills v. Philip Morris USA, Inc., 645 F. Supp. 2d 1107, 1121 (M.D. Fla. 2009). But each Florida Plaintiff alleges that he or she, individually, would not have purchased a Toyota vehicle had Toyota disclosed material facts about the SUA defect. (SAMCC ¶ 66; Danziger Compl. ¶¶ 35-38, 40.) Therefore, they have satisfied the requirement of alleging individual reliance. Toyota also points out that Plaintiffs do not recall the "specifics" of the advertisements on which they supposedly relied in deciding to purchase or lease their Toyota vehicles. (SAMCC ¶ 66; Danziger Compl. ¶¶ 35-38, 40.) Nonetheless, the Court finds Plaintiffs' allegations sufficient to provide a "reasonable delineation of the underlying acts and transactions allegedly constituting the fraud." Maison, 2005 WL 1684159, at *1 (internal quotation marks and citation omitted). Plaintiffs allege that they saw advertisements for Toyota vehicles on television, in the news, on billboards, in brochures at the dealership, on the Internet, or on banners in front of the dealership, and that all of these advertisements touted the safety and reliability of Toyota vehicles. (SAMCC ¶ 66; Danziger Compl. ¶¶ 35-38, 40.)

D. Conclusion Regarding Fraudulent Concealment Claims (Florida)

For the foregoing reasons, the Court denies Toyota's motion to dismiss as to the Florida Plaintiffs' fraudulent concealment claims, but only for those Plaintiffs who allege manifestation of the SUA defect.

VI. Warranty-Based Claims

A. Breach of Express Written Warranty

1. Requirement that Plaintiff Seek Repair of the Vehicle

Toyota argues that the breach of express warranty claim is barred because certain Plaintiffs failed to present their vehicles for repair as required by the terms of the warranty. (Motion at 24-26.)

The Court previously considered this issue under California law, concluding that "Plaintiffs who neither sought repairs pursuant to the recalls nor sought repairs for SUA-related issues may not pursue a claim for breach of express warranty based on the written warranty." (Docket No. 510 at 55.) Refining the parameters of this category of Plaintiffs in a subsequent Order, the Court noted that "Plaintiffs who sought adjustment of their vehicles and/or installation of the [brake-override] 'confidence booster' fall within the broad category of 'Plaintiffs who . . . sought repairs pursuant to the recalls.'" (Docket No. 1414 at 44.) Further clarifying this category, the Court rejected the notion that those who sought "dealer replacement

or repurchase of the vehicle" were entitled to assert this claim, reasoning that the contractual remedy of the written warranty was limited to "repair or adjustment." (Id.) The Court drew a similar conclusion regarding Plaintiffs whose vehicles were damaged beyond repair. (Id. at 45-46.)

Toyota would have the Court reach the same conclusion with respect to the claims of the Florida and New York Plaintiffs. (See Motion at 25 ("As this Court recognized . . . , Plaintiffs who did not present their vehicle for repair cannot claim that Toyota refused or failed to adequately repair their vehicles and, accordingly, their claims must be dismissed.").) However, Plaintiffs raise a new argument as to the claim for breach of written warranty under Florida and New York law that yields a different conclusion, at least at the pleadings stage.

Specifically, Plaintiffs contend that seeking the contractual remedy of adjustment or repair is excused because the warranties fail of their essential purpose. (See SAMCC ¶ 924 (alleging as to claim under Florida law that "the repair and adjust warranty has failed of its essential purpose because Toyota cannot repair or adjust the Defective Vehicles"), ¶ 2152 (making similar allegation regarding claim under New York law).) This argument is based on section 2-719(2) of the Uniform Commercial Code, which has in relevant part been adopted by both Florida and New York. See Fla. Stat. § 672.719(2); N.Y. U.C.C. Law § 2-719(2). In nearly identical wording, both statutes provide that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in" the UCC. Fla. Stat. § 672.719(2); N.Y. U.C.C. Law § 2-719(2). Generally, this provision relieves purchasers from the obligation

to seek a particular remedy where doing so is futile, or "fail[s] of its essential purpose."[32]

Toyota responds by arguing that Plaintiffs still must seek repair under the terms of the relevant written warranty, citing a plethora of case law that supports this general proposition. (See Motion at 24-26; Reply at 16.) However, whether Plaintiffs have sufficiently pleaded a claim that they are excused from literal compliance with their obligation to seek repair of the vehicle must be analyzed based on their factual allegations as a whole. Plaintiffs alleged failure of the essential purpose of the warranty on a fundamental level based on the fact that Toyota limits repair for SUA events to mechanical parts (to the exclusion of electronic parts). (See Opp'n at 22 (citing SAMCC ¶ 478).) At least one other district court in a motor vehicle defect case has held that similar across-the-board allegations in a class action complaint sufficiently pleaded an express written warranty claim based on the warranty's failure of its essential purpose under U.C.C. § 2-719(2). In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 155 F. Supp. 2d at 1115 & n.60.

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[32] Based on an in-depth consideration of California case law involving latent defects, the Court considered, and rejected, an argument that the Plaintiffs were excused from seeking repair of their vehicle because to do so would have been futile. (Docket 510 at 74.) However, Plaintiffs did not base their futility argument on UCC § 2-719(2), and in fact implicitly declined the express opportunity to do so. (See id. at n.24 (noting the absence of briefing on the issue of whether the relevant warranties "failed of their essential purpose" and dismissing without prejudice, rather than with prejudice, to allow repleading on this theory); Docket No. 1414 at 49-50 (noting the effect of Plaintiffs' failure to replead this theory in the SAMCC).) Thus, the Court has had no previous occasion to consider the effect of UCC § 2-719(2) on Plaintiffs' claim for breach of express written warranty.

Nevertheless, the Court must consider the pleading sufficiency of this claim in light of its conclusion that, under both Florida and New York law, only Plaintiffs with manifested defects may assert a claim against the Toyota Defendants. This conclusion vastly alters the landscape of the relevant allegations. Based on the Court's legal ruling, the only New York and Florida Plaintiffs who may assert claims are those who have experienced manifested SUA events and therefore who have had reason to seek out adjustment or repair under the terms of the warranty. Under its terms, such a manifested event clearly triggers the duty to seek adjustment or repair of the vehicle before asserting a claim for breach of the warranty.

That is not to say that a Plaintiff with a manifested defect may never assert a claim. Rather, it is just to say such Plaintiffs must allege something more than across-the-board allegations, such as alleging that their vehicle was purportedly repaired but nevertheless experienced subsequent SUA events or that they were told nothing was wrong with the vehicle.

The sole Florida Class Representative with a manifested SUA defect, Van Zyl, alleges that she "has experienced SUA incidents over the course of several months." (SAMCC ¶ 66.) She alleges she "has reported the surging to her dealer and to the Toyota Customer Experience Center." (Id.) This insufficiently asserts her breach of warranty claims because she does not allege the response she received from her dealership or otherwise set forth allegations with factual content from which it might be plausibly inferred that the defect in her vehicle could not be repaired. Moreover, the allegations she does set forth appear to miscomprehend

the nature of what must "fail of its essential purpose" because they allege that "Ms. Van Zyl paid for a good, her Toyota, that has failed of its essential purpose." (Id.) Under U.C.C. § 2-719(2)'s plain meaning, to invoke its protections, one must allege that the remedy offered in the warranty failed of its essential purpose, not that the product subject to the warranty fails of its essential purpose.

In a point the Court will not belabor, the claims of the sole New York Class Representatives (Rocco and Bridie Doinos) with a manifested defect cannot state a claim for breach of express warranty because their vehicle was totaled. (See SAMCC ¶ 44; cf. Docket No. 1414 at 45.) In fact, at the time, assuming the Doinos' claims arose under California law, the Court previously held that the Doinos could not state a claim for breach of express written warranty based on mutual impossibility of performance under the terms of the warranty. (Id.) New York, like California, excuses performance of contractual obligations where such performance is impossible. See Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902 (1987) ("Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."). Thus, the Doinos' claim for breach of express written warranty fares no better under New York law than it did under California law.

The Toyota Defendants also argue that all claims for breach of express written warranty against TMC must be dismissed because TMS is the sole warrantor. (See Motion at 24 n.24 (citing evidence).) Plaintiffs do not contend otherwise. Accordingly, all claims for breach of express written warranty against

TMC are dismissed with prejudice.

In sum, to state a claim, Plaintiffs who have vehicles with manifested defects must set forth allegations of presentment of the vehicle[33] and other factual content that supports a plausible inference that the defect in their vehicles could not be repaired. Because TMS is the sole warrantor, Plaintiffs' claims against TMC for breach of express written warranty are dismissed with prejudice.

2. Notice Requirement

Toyota argues that both New York and Florida law precludes the claims of Plaintiffs who failed to give notice of an alleged breach. This argument is based on the Uniform Commercial Code § 2-607(3)(a), which both Florida and New York have adopted. This provision requires that "the buyer must within a reasonable time after he [or she] discovers or should have discovered any breach notify the seller of breach[.]" N.Y. U.C.C. § 672.607(3)(a); Fla. Stat. § 672.607(3)(a). If the buyer fails to do so, he or she will "be barred from any remedy[.]" N.Y. U.C.C. § 672.607(3)(a); Fla. Stat. § 672.607(3)(a).

The Court previously considered this claim, as alleged under California's identical version of U.C.C. § 2-607(3)(a). (See Docket No. 510 at 55-57.) There,

[33] On this issue, allegations that the vehicles were taken to the dealership in response to the recall notices or vehicles that were taken for installation of the brake-override "confidence booster" are sufficient. (See Docket No. 510 at 55; Docket No. 1414 at 44.)

the Court concluded that, as interpreted by California Supreme Court case law, § 2-607(3)(a) did not require notice to a manufacturer where purchasers did not deal directly with the manufacturer.[34] (Id. at 56.) As explained below, Florida and New York law are to the contrary.

a. Florida

Unsurprisingly, Florida case law has interpreted U.C.C. § 2-607(3)(a) as requiring a plaintiff-buyer to give notice to a defendant-seller before liability can be imposed. See Gen. Matters, Inc. v. Paramount Canning Co., 382 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 1980) ("This notice requirement is a valid precondition of imposing liability on a seller of goods."). However, the Court believes the issue before the Court is more properly framed as a narrower one: Must the ultimate buyer provide § 2-607(3)(a) notice to a manufacturer that is not the direct seller?

The parties have not cited, and the Court has not found, any Florida state court case that has addressed this specific issue. The federal district court cases applying Florida law have reached differing results.

First, cited by Plaintiffs, is Federal Insurance Co. v. Lazzara Yachts of North America, Inc., 8:09CV607-T-27MAP, 2010 WL 1223126 (M.D. Fla. Mar. 25,

[34] Toyota contends that the Court's holding under California law has been abrogated by Alvarez v. Chevron Corp., 656 F.3d 925, 932 (9th Cir. 2011). That issue is not currently before the Court, and the Court expresses no opinion as to its accuracy.

2010), which looked to a statutory definition of "seller" and concluded that no notice is required against a manufacturer that does not sell directly to a plaintiff. 2010 WL 1223126, at *5. Lazzara Yachts looked to the definition of "seller" as used in the Uniform Commercial Code, and codified by Florida: A "'[s]eller' means a person who sells or contracts to sell goods." Id. (quoting Fla. Stat. § 672.103(1)(d)). From that definition, the court concluded that "[t]he plain language of the statute therefore does not require notice to a manufacturer, such as Lazzara Yacht Corporation." Id.

Cited by Toyota, and holding to the contrary, is Jovine v. Abbott Laboratories, Inc., 795 F. Supp. 2d 1331 (S.D. Fla. 2011). There, the court dismissed claims asserted by consumers against an infant formula manufacturer based on the consumers' failure to give notice pursuant to § 2-607(3)(a). Id. at 1339-40. Accord Nichols v. Wm. Wrigley Jr. Co., 10-80759-CIV-COHN, 2011 WL 181458 (S.D. Fla. Jan. 19, 2011) (dismissing claim of consumer against manufacturer of gum sold through retail establishments for failure to give notice pursuant to § 2-607(3)(a)).

The straightforward statutory analysis employed by the Lazzara Yachts court has its appeal. Moreover, although Jovine and Nichols are both examples of the dismissal of claims by consumers against manufacturers for lack of § 2-607(3)(a) notice, neither case discusses the issue in the terms it is framed before the Court. Nevertheless, the Court believes the conclusion reached by the Jovine and Nichols courts is more persuasive.

The requirement to give notice of an alleged breach of warranty must be viewed in the context of the type of express warranty that was allegedly breached. Under the factual allegations of the present case, to the extent this notice requirement is addressed to the express written warranty, it is in effect merely coextensive of Plaintiffs' obligations under the terms of the warranty to seek repair through a system of Toyota dealers. The Court's holdings regarding those obligations are addressed in section VI.A.1., supra.

To the extent the notice requirement is addressed to the express warranty created by Toyota's advertising, it must be viewed in that context. Assuming that notice must be given to any "seller" under § 2-607(3)(a), it must mean the "seller" who made the representations pursuant to § 2-313(b).[35] Imposing a requirement that Plaintiffs give notice to any other party makes no sense in light of the reasons underlying § 2-607(3)'s notice requirement as articulated by the Florida Court of Appeals:

> There are several important reasons for the notice requirement of Section 672.607(3)(a). The notice enables seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the sellers' own liability to the buyer. The notice requirement also protects the seller's right to

[35] The Court discusses the sufficiency of the express warranty claim based on Toyota's advertising infra. The Court does not understand Toyota to argue that a manufacturer cannot ever create a § 2-313(b) express warranty.

> inspect the goods. . . . Section 672.515, Florida Statutes (1979) (U.C.C. s 2-515 (1972 version)), which codifies the inspection rationale, provides that either party may inspect, test and sample the goods including those in the possession or control of the other for the purpose of ascertaining the facts and preserving the evidence.

Gen. Matters, Inc., 382 So. 2d 1262 at 1264.

Thus, the Court concludes that Florida law imposes a notice requirement on Plaintiffs in these circumstances.

b. New York

New York law does as well. In Burns v. Volkswagen of America, Inc., 468 N.Y.S.2d 958, 959 (App. Div. 1983), the Appellate Division affirmed the lower court's ruling that a vehicle purchaser's breach of express warranty claim against the vehicle's manufacturer must be dismissed for failure to give notice to the manufacturer as required by § 2-607(3)(a). A federal district court in New York has applied Burns and dismissed a similar claim against a manufacturer. Hubbard v. Gen. Motors Corp., 95 CIV. 4362, 1996 WL 274018, at *4 (S.D.N.Y. May 22, 1996) (stating "notice is a requirement under New York law for a breach of

warranty claim').[36]

Plaintiffs argue that notice is not required for retail sales. (Opp'n at 27.) However, an examination of the case law cited in support of this argument reveals that this limitation applies only to retail sales of articles for human consumption. Plaintiffs rely on Neri v. R.J. Reynolds Tobacco Co., No. 98-CV-371, 2000 WL 33911224, at *20 (N.D.N.Y. Sept. 28, 2000) and Fischer v. Mead Johnson Laboratories, 341 N.Y.S.2d 257, 258 (N.Y. App. Div. 1973). Neri involved cigarettes; Fischer involved prescription drugs. Neri relies solely on Fischer; Fischer relies on a pre-U.C.C. case involving a claim based on consumption of a candy bar, Kennedy v. F.W. Woolworth Co., 200 N.Y.S. 121, 122 (App. Div. 1923). Kennedy based its decision on what the Fischer court described as "the predicate for section 2-607 of the Uniform Commercial Code." Fischer, 341 N.Y.S.2d at 259. All of these cases, to the extent they stand for the proposition that § 2-607 notice is not required for retail sales, are limited to retail sales of products for human consumption. Accord In re Hydroxycut Mktg. & Sales Practices Litig., 09MD2087-BTM, 2010 WL 2839480, at *3-4 (S.D. Cal. July 20, 2010) (discussing these three cases as limited to products meant for human consumption).

Thus, the Court concludes that New York law imposes a notice requirement on Plaintiffs in these circumstances.

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[36] The court also noted that "the sufficiency and timeliness of the notice is generally a question for the jury," but in Hubbard, the wholesale failure to plead any notice to the manufacturer warranted dismissal. Id.

3. Design Defects

Toyota argues that Plaintiffs' design defect claims are outside the scope of Toyota's limited warranty. The Court agrees, but notes that, as it found with respect to the claims asserted under California law, the Plaintiffs' allegations allow for the possibility of mechanical defects as well as design defects. (See Docket No. 510 at 59.) Specifically, the Court stated:

> Nevertheless, although the Court concludes that claims based on a design defect are outside of the scope of the express written warranty that guarantees "materials and workmanship," the Court does not agree with Defendants' assessment that Plaintiffs' claims are based solely on alleged design defects. Specifically, Plaintiffs allege: "The failure to design, assemble and manufacture the ETCS-i wiring harnesses in such a way as to prevent mechanical and environmental stresses from causing various shorts and faults, including resistive faults which, in turn, sometimes cause sensor outputs consistent with a request by the driver to fully open the throttle . . . ." ([AMCC] ¶ 245(1)(h) (emphasis added)). Thus, to the extent that Plaintiffs' breach of express warranty claim is based on allegations other than design defects, they are not barred as beyond the scope of the warranty on "materials and workmanship."

(Docket 510 at 59; see also Docket No. 1414 at 42 & n.21 (reiterating the Court's conclusion, providing updated citation from the SAMCC to quotation set forth above, and citing to allegations newly pled in the SAMCC).)

Thus, the Court concludes that although alleged design defects cannot provide the basis for Plaintiffs' breach of express written warranty claims, Plaintiffs state a claim for breach of express written warranty because their claim is supported by allegations that implicate the warranty's coverage of "materials and workmanship."

B. Express Warranty Created by Representations in Advertisements

In addition to the claim based on a breach of the express written warranty, Plaintiffs allege that Defendants extended an additional warranty by virtue of statements regarding the safety and performance of their vehicles. (SAMCC ¶¶ 901-04 (Florida), ¶¶ 2150-53 (New York).) Toyota argues that both New York and Florida law preclude this claim.

This claim is based on the Uniform Commercial Code § 2-313(1)(a)-(b), which both Florida and New York have adopted with identical wording:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the

> seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Fla. Stat. § 672.313(1)(a)-(b); N.Y. U.C.C. § 2-313(1)(a)-(b).

The Court previously considered this claim, as alleged under California's identical version of U.C.C. § 2-313(1)(a)-(b). (See Docket No. 510 at 61-64.) There, the Court concluded that the allegations set forth in the SAMCC set forth "specific and unequivocal" allegations that Toyota made statements that its vehicles were safe and that its use of advanced technology enhanced that safety. (Id. at 62.) The Court noted, however, that Plaintiffs' claim was insufficiently pleaded because they failed to allege they were exposed to Toyota's advertising statements. (Id. at 62-63.) The court also noted that Plaintiffs were not required to allege reliance on those statements. (Id. at 63 n.22.) Plaintiffs were granted leave to amend to add allegations regarding their exposure to Toyota's advertising. (Id. at 103.)

The issues presented as to the claim under Florida and New York law are the same as they were under California law: Are the alleged statements the type of statements that create an express warranty under U.C.C. § 2-313(1)(a)-(b)? Have Plaintiffs alleged exposure to Toyota's advertising? Must Plaintiffs allege actual

reliance, and if so, have they?

All the Class Representatives make allegations nearly identical to those made by Florida Plaintiff Epps, who alleges that although he "does not recall the specifics" of the Toyota advertisements he saw, he does "recall that safety and reliability were consistent themes" throughout. (See Danziger Compl. ¶¶ 36-37, 40-41; SAMCC ¶¶ 44, 56, 66.) Against these factual allegations, the Court considers whether the Class Representatives allege they were exposed to representations (upon which they either relied or were excused from relying) and that were sufficient to give rise to a § 2-313 warranty.

Representations

As the Court noted in considering the issue under California law, to create a warranty, representations regarding a product must be specific and unequivocal. See Johnson v. Mitsubishi Digital Elecs. Am., Inc., 578 F. Supp. 2d 1229, 1236 (C.D. Cal. 2008) (stating that to create an express warranty, the seller must make representations or promises with sufficient specificity); Keith v. Buchanan, 173 Cal. App. 3d 13, 21 (1985) (setting forth factors to consider regarding whether a statement creates a warranty, including amount of specificity and lack of equivocalness). Florida law and New York law are materially indistinguishable.

Under Florida law, "a wide variety of statements made by sellers have been found to be 'affirmations of fact'" and "an express warranty is generally considered to arise . . . where the seller asserts a fact of which the buyer is ignorant prior to the

beginning of the transaction." Thursby v. Reynolds Metals Co., 466 So. 2d 245, 250 (Fla. Dist. Ct. App. 1984) (internal citation omitted).

Under New York law, "[i]n order to demonstrate that an express warranty was created under . . . [U.C.C. § 2-313], a plaintiff must prove that the statement falls within the definition of a warranty, that she relied on it, and that it became part of the basis for the bargain." Kraft v. Staten Island Boat Sales, Inc., 715 F. Supp. 2d 464, 472-73 (S.D.N.Y. 2010) (internal quotation marks and citation omitted). To "'fall within the definition of a warranty,' a statement must be 'an affirmation of fact or promise by the seller, the natural tendency of which is to induce the buyer to purchase'" Id. (quoting Friedman v. Medtronic, Inc., 345 N.Y.S.2d 637, 643 (1973)).

Plaintiffs' allegations regarding the type of statements supporting their U.C.C. § 2-313 claim are sufficient. As the standard is stated under Florida law, it can fairly be inferred that the typical consumer lacks knowledge regarding a particular vehicle's safety and reliability before buying or leasing it. By the same token, following the language of the standard as stated under New York law, the positive representations regarding safety and reliability that are made by a manufacturer responsible for the overall design of a motor vehicle are statements that have "the natural tendency" to induce purchase of that vehicle. Thus, whether measured by California, Florida, or New York case law interpreting U.C.C. § 2-313, Plaintiffs' specific allegations regarding Toyota's assurances of "safety and reliability" sufficiently allege the type of representations which trigger the applicability of U.C.C. § 2-313.

Exposure

Almost all Plaintiffs here sufficiently allege exposure.[37] Although Plaintiffs generally allege they cannot recall the specifics of any particular advertising to which they were exposed, they allege these advertisements featured safety and reliability. Given the SUA allegations found throughout the SAMCC, which the Court has previously observed "represent the antithesis of"[38] the representations identified by Plaintiffs as influencing their purchasing decisions, these allegations contain sufficient factual content to state a plausible claim for breach of express warranty under U.C.C. § 2-313(1)(a)-(b).

Reliance

Unlike the case law of California interpreting U.C.C. § 2-313, both Florida and New York Courts require reliance on the representations that give rise to the express warranty. See Royal Typewriter Co., a Div. of Litton Business Sys., Inc. v. Xerographic Supplies Corp., 719 F.2d 1092, 1101 (11th Cir. 1983) (applying Florida law and concluding that the requirement that the representation "be part of the basis of the bargain" is "essentially a reliance requirement"); CBS Inc. v. Ziff-Davis Publ'g Co., 75 N.Y.2d 496, 506 n.5 (N.Y. 1990) (cited with approval in

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[37] Plaintiff Gudmundson does not. (See generally Gudmunson Complaint.) Although generally the Court would permit him to replead this claim, because all his claims are barred due to the fact that he has not experienced a SUA event, this claim is not subject to repleading.

[38] Docket No. 510 at 62.

Horowitz v. Stryker Corp., 613 F.Supp.2d 271, 286 (E.D.N.Y. 2009) (dismissing § 2-313 warranty claim for failure to allege reliance)).[39]

Here, by alleging that "representations about safety and reliability influenced [their] decision[s] to purchase [or lease their vehicles,]" most of the Class Representatives sufficiently allege reliance. (See Danziger Compl. ¶¶ 36-37, 40; SAMCC ¶¶ 44, 66; cf. Danizger Compl. ¶ 40 (New York Plaintiff Veitz "bought [her] Prius because she believed Toyotas were safe and reliable vehicles" and "[t]his understanding was acquired . . . from Toyota advertising[.]"). Only John and Mary Laidlaw fail to allege actual reliance.[40] (SAMCC ¶ 56.)

Thus, except as set forth above, the Court finds that the allegations in the SAMCC set forth claims for breach of a § 2-313(1)(a)-(b) warranty because Plaintiffs sufficiently allege their exposure to and reliance on statements in Toyota's advertising that created this type of express warranty.

[39] The cases upon which Plaintiffs rely do not hold to the contrary. None of the cases cited by Plaintiffs consider a U.C.C. § 2-313 claim. (See Opp'n at 37-38 (citing New York and Florida cases).)

[40] Although generally the Court would permit them to replead this claim, because all of the Laidlaws' claims are barred due to the fact that they have not experienced a SUA event, this claim is not subject to repleading.

C. Breach of the Implied Warranty of Merchantability

Toyota urges dismissal of Plaintiffs' breach of implied warranty claims under New York and Florida law. (Motion at 32-36.)

1. New York

Under New York law, Plaintiffs bring a claim for breach of implied warranty pursuant to U.C.C. § 2-314, codified in New York at N.Y. U.C.C. § 2-314. In relevant part, the implied warranty provision states:

> [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . Goods to be merchantable must be . . . fit for the ordinary purposes for which such goods are used . . . .

N.Y. U.C.C. § 2-314(1), (2)(c).

Toyota contends that Plaintiffs' implied warranty claim is barred because there is no vertical privity of contract between Plaintiffs and the Toyota Defendants. (See Motion at 32-36.) Generally, such vertical privity is required. See Cali v. Chrysler Grp. LLC, 10 CIV. 7606 JSR, 2011 WL 383952 (S.D.N.Y. Jan. 18, 2011), aff'd, 426 F. App'x 38 (2d Cir. 2011); Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corp., 504 N.Y.S.2d 192, 192 (App. Div. 1986) ("It is now settled that no

implied warranty will extend from a manufacturer to a remote purchaser not in privity with the manufacturer where only economic loss and not personal injury is alleged.") (collecting cases).

Plaintiffs contend that New York recognizes an exception to the vertical privity requirement for "things of danger." (Opp'n at 39.) This exception was articulated in the New York Court of Appeals case of Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436-37 (1963):

> [W]here an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned, the manufacturer as well as the vendor is liable, for breach of law-implied warranties, to the persons whose use is contemplated.

Id. Plaintiffs' claims clearly fall into this category. Plaintiffs allege they purchased vehicles prone to events of SUA, which render their vehicles uncontrollable and dangerous when operated by them.

In response, Toyota argues that this exception no longer has the force of law. (Reply at 24-27.) Although Toyota cites a number of post-Goldberg cases that in fact stand for the general proposition that vertical privity is a requirement to maintain a breach of implied warranty claim, none of those cases discuss the "thing of danger" exception. See generally Parker v. Raymond Corp., 930 N.Y.S.2d 27

(N.Y. App. Div. 2011); Adirondack Combustion Techs., Inc. v. Unicontrol, Inc., 793 N.Y.S.2d 576 (N.Y. App. Div. 2005); Lexow & Jenkins, 504 N.Y.S.2d at 192 (N.Y. App. Div. 1986); Miller v. Gen. Motors Corp., 471 N.Y.S.2d 280 (N.Y. App. Div. 1984), aff'd, 479 N.E.2d 249 (N.Y. 1985); Arthur Jaffee Assocs. v. Bilsco Auto Serv., Inc., 453 N.Y.S.2d 501 (N.Y. App. Div. 1982), aff'd, 448 N.E.2d 792 (N.Y. 1983); Hole v. Gen. Motors Corp., 442 N.Y.S.2d 638 (N.Y. App. Div. 1981); Cali, 2011 WL 383952.

In contrast, recent district court cases have expressly applied New York law's "thing of danger" exception, relying on Goldberg to allow breach of implied warranty claims to proceed against a remote manufacturer. See, e.g., Doll v. Ford Motor Co., 814 F. Supp. 2d 526, 541 (D. Md. 2011) (applying NY law); In re Ford Motor Co. E-350 Van Products Liab. Litig. (No. II), CIV. A. 03-4558, 2010 WL 2813788 (D.N.J. July 9, 2010) (applying NY law), amended on other grounds, CIV.A. 03-4558 GEB, 2011 WL 601279 (D.N.J. Feb. 16, 2011); Hubbard v. Gen. Motors Corp., 95 CIV. 4362, 1996 WL 274018 (S.D.N.Y. May 22, 1996). This Court follows suit and holds that the New York Class Representatives may assert their breach of implied warranty claim based on New York's "thing of danger" exception to the vertical privity requirement.

2. Florida

As to claims brought under Florida law, Plaintiffs candidly acknowledge that Florida implied warranty law unequivocally requires privity of contract. (Opp'n at 41.) Applying Florida Supreme Court precedent, district courts in Florida have so

held. See, e.g., Levine v. Wyeth Inc., 684 F.Supp.2d 1338, 1345 (M.D. Fla. 2010) (relying on Kramer v. Piper Aircraft Corp., 520 So.2d 37, 39 (Fla. 1988). Thus, the implied warranty claims brought under Florida law are dismissed with prejudice.

D. MMA Claims

As the Court previously concluded, Plaintiffs' claims pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("MMA"), 15 U.S.C. §§ 2301-2312, et seq., are dependent upon their state-law warranty claims. (See Docket No. 510 at 75.) Thus, to the extent Plaintiffs have stated express and implied warranty claims, they have also stated claims under the MMA. See Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp. 2d 519, 540 (E.D.N.Y. 2006); Ocana v. Ford Motor Co., 992 So. 2d 319, 326 (Fla. Dist. Ct. App. 2008).

1. Requirement that Consumers Follow Dispute Resolution Process

As they did with the California Plaintiffs,[41] the Toyota Defendants argue these claims are barred because Plaintiffs have not alleged they complied with Toyota's informal dispute resolution procedures as required by 15 U.S.C. § 2310(a). (Docket No. 510 at 75-77; Motion at 39-42.) The MMA contains an explicit congressional policy statement encouraging "warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). Pursuant to this policy, a "class of consumers may not proceed in a class action . . . unless the named plaintiffs . . . initially resort to [the warrantor's informal dispute settlement mechanism]." Id. § 2310(a)(3)(C)(ii).

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[41] In their Opposition, Plaintiffs contend that this argument is foreclosed by the Court's Order re Bellwether Motions Filing (Docket No. 2016 ¶ 1), which stated that it would consider only arguments directed as "claims for relief under Florida and New York law." (Opp'n at 42.) Although the Court agrees that the issue presented regarding the requirement that consumers follow a dispute resolution process is identical as to California, Florida, and New York Plaintiffs, the Court notes an inaccuracy in Plaintiffs' contention. Plaintiffs contend that Toyota is foreclosed from arguing the "opportunity to cure procedures" set forth in 15 U.S.C. § 2310(e). (Id.) However, the parties did not previously raise, and thus the Court did not previously consider, the § 2310(e) issue.

The Court notes, however, that the futility rationale regarding the dispute resolution process applies with equal force to the opportunity to cure procedures. Additionally, although § 2310(e) is far from a model of clarity, it appears clear that a Court may — notwithstanding the failure to provide an opportunity to cure to the warrantor — consider the claims of a putative class representative at least to determine the class representative's "representative capacity" pursuant to Rule 23 of the Federal Rules of Civil Procedure. As such, dismissal at this time is unwarranted.

Previously, when considering this precise issue, the Court held that it would not dismiss on this ground because the allegations in the SAMCC permitted an inference that compliance with this requirement was futile, and as such, was excused. (Docket 510 at 76-77 (citing Milicevic v. Mercedes-Benz USA, LLC, 256 F. Supp. 2d 1168, 1179 (D. Nev. 2003), aff'd on other grounds, 402 F.3d 912 (9th Cir. 2005); Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 593 (C.D. Cal. 2008)).)

In response, Toyota cites a number of cases it contends hold to the contrary. (Motion at 40.) However, none of these cases expressly discuss or reject a futility exception. See generally Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 474 (5th Cir. 2002); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams, 899 F.2d 1315, 1317 (2d Cir. 1990); Wolf v. Ford Motor Co., 829 F.2d 1277, 1278 (4th Cir. 1987). Thus, these cases are unpersuasive on this issue.

2. Whether Lessees of Vehicles May Maintain an MMA Claim under New York Law

Toyota contends that the New York Class Representatives who leased their vehicles may not maintain a claim under the MMA. A decision of the New York Court of Appeals — that State's highest court — so holds. DiCintio v. DaimlerChrysler Corp., 768 N.E.2d 1121, 1121 (N.Y. 2002).

The DiCinto court began its analysis with an examination of the MMA provision authorizing a civil action: "'[A] consumer who is damaged by the failure

of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract' to sue warrantors for damages and other relief in any court of competent jurisdiction." Id. (quoting 15 U.S.C. § 2310(d)(1)). That provision is today unchanged. See 15 U.S.C. § 2310(d)(1)(A)-(B). The DiCinto court looked next to the statutory definition of "consumer," which is also unchanged:

> "[A] buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)."

DiCinto, 768 N.E.2d at 1123 (quoting 15 U.S.C. § 2301(3)).

Here, lessees who lease a vehicle subject to a warranty (as Plaintiffs have done here), would appear to fall into the third category, seemingly a "catch-all" category of "any other person who is entitled . . . to enforce . . . the warranty." However, the DiCinto court rejected this contention, relying on the statutory definitions of "written warranty" and "implied warranty," each of which requires that the relevant "written affirmation[s] of fact," "written promise[s]," "undertaking[s] in writing," or "implied warrant[ies] arising under State law," be

"in connection with the sale . . . of a consumer product." DiCinto, 768 N.E.2d at 1124 (quoting 15 U.S.C. § 2301(6)-(7)) (internal quotation marks and citation omitted). In the absence of a statutory definition of "sale" or "buyer," the DiCinto court went on to apply definitions of those terms as used by the Uniform Commercial Code. Id. Ultimately, the court concluded the definition of "consumer" did not include lessees. Id.

Were this a question of state law, the Court would be compelled to follow the reasoning of DiCinto. See Estate of Bosch, 387 U.S. at 465. However, statutory interpretation of the MMA is not a question of state law.

In examining the statutory language, the Court determines that a lessee is a consumer, if at all, under the third category, as "any other person . . . entitled by the terms of such warranty . . . or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)." Toyota clearly extends the manufacturer warranty to leased vehicles. (See, e.g., Dawson Decl. Ex. C-16 (Docket 2008-8) at 57 ("When Warranty Begins/The warranty period begins on the vehicles' in-service date, which is the first date the vehicle is either delivered to an ultimate purchaser, leased, or . . . .").) However, merely being "any other person . . . entitled by the terms of such warranty" implicates the MMA definition of "written warranty," which, in turn, implicates the definition of "sale" and "buyer" that became problematic for the lessees in DiCinto. As held by DiCintio, it is Toyota's position that lessees may not assert MMA claims because to be a "written warranty," the warranty must be "in connection with a sale." (See Reply at 28-30.)

The Court disagrees, and holds in accord with the Seventh Circuit, which found a difference between the first and second clauses of the "catch-all category" of "consumers" as defined by the MMA. See Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516 (7th Cir. 2003). In Voelker, the court held that notwithstanding the failure of the relevant warranty to meet the statutory definition of "written warranty," the lessee was nevertheless a "consumer" under the MMA because he was entitled to enforce "the warranty" "under applicable State law." 353 F.3d. at 525. Probably the best articulation of a statutory construction that supports Voekler's conclusion, and this Court's conclusion, was made by the Florida Supreme Court in America Honda Motor Co., Inc. v. Cerasani, 955 So. 2d 543, 547-48 (Fla. 2007). After quoting the definition of "consumer" quoted above, and noting it sets up three categories of "consumers," the court stated:

> It is clear that the use of the term "written warranty" in Category Two invokes the definition of "written warranty" set forth in section 2301(6). With the use of the term "written warranty" in Category Two in mind, we read the language creating Category Three as follows:
>
> > The term "consumer" means . . . any other person who is entitled [a] by the terms of such warranty (or service contract) or [b] under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty.

Id. at 548. From there, the Court considered the meaning of "[t]he demonstrative adjective 'such,' meaning 'of the same type, class, or sort,'" finding that it "refer[red] to the antecedent noun 'written warranty.'" Id. (citation omitted). Thereafter, the court articulated the reasoning for its ultimate conclusion:

> Thus, the first alternative in Category Three requires that the warranty be a "written warranty" as defined in section 2301(6). However, Congress did not use the term "written warranty" or "such warranty" in setting forth the criteria for the second alternative, instead using the generic term "the warranty." Therefore, we conclude that the type of warranty enforceable under state law that will enable a person to qualify as a Category Three consumer is not limited to the narrow definition of "written warranty" provided in the MMWA.

Id. The Court agrees with this construction of "consumer."

The only question that remains, then, is where lessee Plaintiffs fall into the second alternative of the third category, i.e., persons who are "under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty." 15 U.S.C. § 2301(3). Because lessees' vehicles are covered by the terms of the relevant warranties, the Court has no difficulty concluding that they fall into that second alternative. New York permits enforcement of warranties by

lessees who are granted rights by the terms of the warranties themselves. See, e.g., Uniflex, Inc. v. Olivetti Corp. of Am., 445 N.Y.S.2d 993, 995 (N.Y. App. Div. 1982) (affirming denial of motion to dismiss warranty claims where lessee entitled to rights under the express terms of the warranty); Stuart Becker & Co., P.C. v. Steven Kessler Motor Cars, Inc., 517 N.Y.S.2d 692, 695 (Sup. Ct. 1987).

Therefore, the lessee Plaintiffs fall within the definition of "consumers" under the MMA, notwithstanding DiCinto's interpretation of the MMA that would suggest the contrary.

VII. Breach of Contract/Common Law Warranty

Plaintiffs plead common law claims under Florida and New York law in the alternative to their statutory claims. (See SAMCC ¶ 930 ("To the extent Toyota's repair or adjust commitment is deemed not to be a warranty under Florida's Commercial Code, Plaintiffs plead in the alternative under common law warranty and contract law."), ¶ 2179 (same, under New York law).).

As the Court found with these claims as pleaded under California law (Docket 510 at 71), Plaintiffs are entitled pursuant to Fed. R. Civ. P. 8(d)(2) and 8(a)(3) to plead these claims in the alternative; thus, their dismissal at the pleadings stage is not warranted.

VIII. Conclusion

As set forth herein, the Court grants in part and denies in part the Motion to Dismiss. To the extent the Motion to Dismiss is not expressly granted, it is denied.

A. Florida Law

1. Dismissal With Prejudice

The following claims are dismissed with prejudice:

All claims of Plaintiffs who have not alleged and cannot allege they experienced a SUA incident, i.e., who cannot allege a manifestation of the alleged defect.

All claims for breach of express written warranty to the extent they are based upon design defects rather than defects in "materials and workmanship."

Claims for breach of express written warranty of Plaintiffs who have not alleged and cannot allege compliance with the requirement that they presented their vehicle for repair.[42]

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[42] The claim of any plaintiff who has not, but who can in good faith allege compliance with the presentment requirement, is dismissed without prejudice and may be repleaded.

All claims for breach of express written warranty asserted against TMC.

Claims for breach of express warranty based on advertisements asserted by Plaintiffs who have not alleged and cannot allege they gave notice to the party who allegedly made the representation(s) creating the express warranty.[43]

All claims for breach of implied warranty of merchantability.

2. Dismissal Without Prejudice

The following claims under Florida law have been effectively withdrawn by Plaintiffs, and are dismissed without prejudice.

Revocation of Acceptance and Unjust Enrichment.

B. New York Law

1. Dismissal With Prejudice

The following claims are dismissed with prejudice:

All claims of Plaintiffs who have not alleged and cannot allege

[43] The claim of any plaintiff who has not, but who can in good faith allege compliance with the notice requirement, is dismissed without prejudice and may be repleaded.

they experienced a SUA incident, i.e., who cannot allege a manifestation of the alleged defect, except those Plaintiffs who have experienced a recognized loss on sale as a result of the unmanifested defect (who may replead accordingly).

All claims for breach of express written warranty to the extent they are based upon design defects rather than defects in "materials and workmanship."

Claims for breach of express written warranty of Plaintiffs who have not alleged and cannot allege compliance with the requirement that they presented their vehicle for repair. [44]

All claims for breach of express written warranty asserted against TMC.

Claims for breach of express warranty based on advertisements asserted by Plaintiffs who have not alleged and cannot allege they gave notice to the party who allegedly made the representation(s) creating the express warranty.[45]

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[44] The claim of any plaintiff who has not, but who can in good faith allege compliance with the presentment requirement, is dismissed without prejudice and may be repleaded.

[45] The claim of any plaintiff who has not, but who can in good faith allege compliance with the notice requirement, is dismissed without prejudice and may be repleaded.

2. Dismissal Without Prejudice

The following claims under New York law have been effectively withdrawn by Plaintiffs, and are dismissed without prejudice:

Revocation of Acceptance and Unjust Enrichment.

IX. Repleading

Within thirty days of the entry of this Order, Plaintiffs are directed to file a Third Amended Master Consolidated Complaint ("TAMCC") that conforms with the present Order and the Court's previous Orders considering the sufficiency of the claims pleaded under California law.

In drafting their TAMCC, Plaintiffs must consolidate into one document the re-pleaded or un-dismissed claims from the SAMCC, Gudmundson Complaint, and Danziger Complaint. Additionally, Plaintiffs must incorporate in the TAMCC the limitations, definitions, and identification of Plaintiffs currently set forth in the Class ID Statement. The goal in repleading in this manner is for the TAMCC to be the only document to which the Court and parties must refer to determine the claims asserted in the economic loss class actions and eliminate the current need to refer to multiple documents to identify the scope of Plaintiff's claims. The TAMCC should

continue to set forth the alternative state law counts of all states, but as previously ordered, the claims asserted under California, Florida, and New York law will remain the basis of the class action bellwether trial.

IT IS SO ORDERED.

DATED: May 4, 2012

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE